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No.

In the Supreme Court of the United States

DEPARTMENT OF THE ARMY, PETITIONER

v.

JOHN E. KIRKENDALL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the 15-day statutory time limit for filing an appeal with the Merit Systems Protection Board from a decision of the Secretary of Labor denying a complaint under the Veterans Employment Opportunities Act of 1998, 5 U.S.C. 3330a(d), is subject to equitable tolling.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Department of the Army, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-85a) is reported at 479 F.3d 830. The panel opinion of the court of appeals (App., *infra*, 89a-110a) is reported at 412 F.3d 1273. The opinions and orders of the Merit Systems Protection Board (App., *infra*, 111a-113a, 124a-129a) are reported at 97 M.S.P.R. 605 (Table) and 94 M.S.P.R. 70. The initial decisions of the administrative law judge (App., *infra*, 114a-123a, 130a-139a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2007. On May 24, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 5, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3330a of Title 5 of the United States Code is reproduced in the appendix to this petition (App., *infra*, 143a-146a).

STATEMENT

1. In order to facilitate the readjustment of veterans to civilian life, federal law has long provided preferences to certain veterans, including disabled veterans, seeking employment with the executive branch of the federal government. See, *e.g.*, 5 U.S.C. 2108(3)(C). Veterans who are "preference eligible" are awarded additional points in the process used to make hiring decisions. See, *e.g.*, 5 U.S.C. 3309(1). This case concerns the time limits for administrative appeals from the denial of claims alleging a violation of the veterans' preference laws.

To establish "a uniform redress mechanism for the enforcement of veterans' preference laws in both hiring and reductions-in-force decisions," S. Rep. No. 340, 105th Cong., 2d Sess. 15 (1998); accord H.R. Rep. No. 40, 105th Cong., 1st Sess., Pt. 1, at 9 (1997), Congress enacted the Veterans Employment Opportunities Act of 1998 (VEOA), 5 U.S.C. 3330a *et seq.* The VEOA provides that "[a] preference eligible [veteran] who alleges that an agency has violated such individual's rights under any statute or regulation relating to veterans' preference may file a complaint with the Secretary of La-

bor." 5 U.S.C. 3330a(a)(1). Such a complaint "must be filed within 60 days after the date of the alleged violation." 5 U.S.C. 3330a(a)(2)(A). If the Secretary of Labor (Secretary) is unable to resolve the complaint within 60 days of its filing, the complainant may elect to appeal the alleged violation to the Merit Systems Protection Board (MSPB or Board). 5 U.S.C. 3330a(d)(1). In the language at issue here, the VEOA provides that "in no event may any such appeal be brought * * * before the 61st day after the date on which the complaint is filed; or * * * later than 15 days after the date on which the complainant receives written notification from the Secretary" that she was unable to resolve the complaint. *Ibid.*

2. Respondent is a disabled veteran who applied for the civilian position of Supervisory Equipment Specialist in the Aircraft Maintenance Division at the Army base at Fort Bragg, North Carolina. The Army treated respondent as "preference eligible," but found that he was ineligible for the position because his application lacked sufficient detail to allow the Army to determine whether he possessed sufficient experience for the particular job he sought. On January 5, 2000, the Army notified respondent of its decision. The Army chose another disabled veteran, who was also "preference eligible," to fill the position. App., *infra*, 2a-3a.

Respondent subsequently filed a complaint with the Secretary of Labor under the VEOA, alleging that the Army violated his preference rights. Although the record does not reflect exactly when respondent filed the complaint, it is undisputed that he filed it more than 60 days after the alleged violation. App., *infra*, 3a, 92a n.1. On November 29, 2001, the Secretary informed respondent that his complaint had been dismissed as untimely. *Id.* at 140a-141a. In the notice of dismissal, the Secre-

tary specifically informed respondent that he had "the right to take [his] claim to the [MSPB]," and that "that claim must be filed *within 15 days* of the date following the receipt of this notification." *Ibid.*

3. Nearly 200 days later, on June 13, 2002, respondent filed an appeal with the MSPB from the Secretary of Labor's denial of his VEOA complaint. An administrative judge dismissed the appeal. App., *infra*, 130a-139a. As a preliminary matter, the administrative judge noted that "[respondent] does not deny that his complaint to [the Secretary] was filed after the time limit set by statute." *Id.* at 133a. Because the Secretary had rejected respondent's complaint as untimely, the administrative judge concluded that the MSPB lacked jurisdiction over respondent's appeal. *Ibid.* In the alternative, the administrative judge noted that, even assuming that the MSPB had jurisdiction, "[respondent's] appeal was not filed with the Board until June 13, 2002, long after he received [the Secretary's] November 29, 2001 notification." *Id.* at 134a. The administrative judge concluded that, because "VEOA's 15-day deadline for filing an appeal cannot be waived," "an appeal filed beyond that deadline must be dismissed." *Ibid.*

4. The full Board denied review in relevant part. App., *infra*, 124a-129a. It reasoned that respondent's petition for review "d[id] not meet the criteria for review set forth at 5 C.F.R. § 1201.115." App., *infra*, 125a. That regulation provides for review by the full Board of initial decisions by administrative law judges where, *inter alia*, "[t]he decision of the judge is based on an erroneous interpretation of statute or regulation." 5 C.F.R. 1201.115(d)(2).

5. A divided panel of the court of appeals reversed and remanded. App., *infra*, 89a-110a. It held both that

the 60-day period established by 5 U.S.C. 3330a(a)(2)(A) for filing a VEOA complaint with the Secretary of Labor is subject to equitable tolling, and, as is relevant here, that the 15-day period established by 5 U.S.C. 3330a(d)(1) for filing an appeal with the MSPB is also subject to equitable tolling. App., *infra*, 89a-110a.

6. At the Department of the Army's request, the court of appeals granted rehearing en banc. App., *infra*, 86a-88a. Before the en banc court, the government argued that equitable tolling is not available for the 15-day appeal period established by Section 3330a(d)(1). Adopting the position of the panel, the en banc court of appeals reversed the Board and remanded, holding by a 7-6 majority that the 15-day appeal period is subject to equitable tolling. *Id.* at 1a-85a.

a. In an opinion written by Judge Mayer and joined in relevant part by Chief Judge Michel, Judges Newman, Schall, Gajarsa, and Linn, and Senior Judge Plager, the court of appeals explained that, in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), this Court "established the presumption that equitable tolling is available in suits against the government when permitted in analogous private litigation." App., *infra*, 6a. The court of appeals reasoned that, because equitable tolling is available on a claim of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and respondent's VEOA claim was "sufficiently analogous" to a Title VII claim, equitable tolling is presumptively available on respondent's VEOA appeal. App., *infra*, 8a-9a.

The court of appeals then concluded that Congress had failed to "evince[] a clear intent to rebut that presumption." App., *infra*, 9a. The court rejected the government's argument that, by providing in Section

3330a(d)(1) that an appeal may "in no event" be brought outside the 15-day period, Congress manifested its intent to prohibit equitable tolling. *Id.* at 10a. While acknowledging that the phrase "in no event" is "certainly strong," the court reasoned that "the statute's technical language is little more than a neutral factor in our analysis." *Ibid.* The court concluded that the statutory language was "analogous to statutory language" providing simply that a claim "shall be filed," or would be "barred" if not filed, within the requisite period. *Id.* at 15a (citations omitted). "Because the 'in no event' language is of limited, if any, special importance," the court continued, "we firmly reject the government's contention that allowing equitable tolling here renders that language superfluous." *Ibid.*

In support of its conclusion that the time limit in Section 3330a(d)(1) is subject to equitable tolling, the court of appeals noted that "section 3330a is not detailed"; "section 3330a's fairly simple language is not technical"; "the timing provisions in section 3330a are not repeated"; "section 3330a does not contain explicit exceptions to the two filing deadlines"; and "the 15-day filing period under section 3330a(d)(1)(B) is extraordinarily short." App., *infra*, 16a-17a. The court further observed that the purpose of the VEOA—"to assist veterans in obtaining gainful employment with the federal government and to provide a mechanism for enforcing this right"—and the canon that "veterans' benefits statutes should be construed in the veteran's favor" supported the conclusion that equitable tolling is available. *Id.* at 18a, 22a.

The court of appeals also rejected the government's argument that the time limit in Section 3330a(d)(1) is jurisdictional, and, as a result, is mandatory and not

subject to equitable tolling. App., *infra*, 18a-21a. Relying on its earlier decision in *Bailey* v. *West*, 160 F.3d 1360 (Fed. Cir. 1998) (en banc), the court reasoned that statutes specifying periods for *review*, like statutes of limitations, were subject to a presumption in favor of equitable tolling. App., *infra*, 19a. The court of appeals further reasoned that, in subsequent decisions, this Court had "clarified that time prescriptions, however emphatic, are not properly typed 'jurisdictional.'" *Id.* at 19a-20a (internal quotation marks omitted) (citing *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500 (2006); *Eberhart* v. *United States*, 546 U.S. 12 (2005) (per curiam); *Scarborough* v. *Principi*, 541 U.S. 401 (2004); and *Kontrick* v. *Ryan*, 540 U.S. 443 (2004)). The court of appeals discounted as "irrelevant" the fact that some periods for review, such as the 90-day period for filing petitions for certiorari in this Court in civil cases, are not subject to equitable tolling. *Id.* at 20a-21a.

b. Judge Gajarsa, joined by Judge Linn and Senior Judge Plager, concurred. App., *infra*, 28a-43a. Judge Gajarsa agreed with the majority that a VEOA claim was analogous to a Title VII claim, for which equitable tolling is available. *Id.* at 30a-31a. He also agreed that there was "no good reason to believe" that Congress would have wanted to prohibit equitable tolling. *Id.* at 34a (internal quotation marks and citation omitted). With regard to the statutory language, Judge Gajarsa reasoned that "Congress could have placed the words 'equitable tolling shall not apply' in the statute but did not do so." *Id.* at 40a. Judge Gajarsa added that the court of appeals' earlier decision in *Bailey* "compels us not to create a new exception applying a lighter or no presumption to time limits dealing with periods of review." *Id.* at 42a-43a.

c. Judge Moore, joined by Judges Lourie, Rader, Bryson, Dyk, and Prost, dissented in relevant part. App., *infra*, 43a-80a. At the outset, Judge Moore noted that "Congress set forth the 15-day deadline in unusually emphatic form." *Id.* at 46a. "If the 'in no event' language is not meant to foreclose tolling," she explained, "it would be entirely superfluous." *Id.* at 47a. "Short of saying 'equitable tolling shall not apply,'" she continued, "Congress could not have been clearer." *Ibid.* (footnote omitted). Judge Moore contended that the court's approach was "inconsistent with basic and fundamental tenets of statutory construction, which attempt to discern congressional intent by first looking to the language of the statute itself." *Id.* at 48a-49a.

Judge Moore next reasoned that "[r]eading the emphatic 'in no event' language as it is used in the context of the entire VEOA further evinces Congress's intent to preclude tolling." App., *infra*, 51a. She noted that, "[i]n all other parts of the VEOA, Congress used less emphatic language to establish time limits," *ibid.*, and that "[the VEOA's] time limits are detailed and sequential," *id.* at 52a. Judge Moore suggested that the purpose of the VEOA was to allow expeditious resolution of claims challenging an agency's hiring decision. *Id.* at 55a. According to Judge Moore, "[i]t is also significant that this statute is one specifying the time for filing an appeal." *Ibid.* She noted that, in the VEOA context, "[a]ppeals * * * are filed after the appellant has received notice regarding the specific time periods and location for appealing," and that respondent had received such notice in this case. *Id.* at 56a-57a.

Finally, Judge Moore reasoned that the 15-day deadline is, "in many ways, mandatory and jurisdictional in that [Section 3330a] is the sole statute providing the

Board's jurisdiction over VEOA claims." App., *infra*, 58a. In addition, she explained that, "[t]o the extent that *Bailey* is read as permitting equitable tolling even where a statute is decisively 'mandatory and jurisdictional[,]' it would seem inconsistent with Supreme Court precedent." *Id.* at 55a n.5 (citing *Stone* v. *INS*, 514 U.S. 386 (1995), and *Missouri* v. *Jenkins*, 495 U.S. 33 (1990)).

d. Judge Dyk also dissented separately. App., *infra*, 80a-85a. In his view, "the doctrine of equitable tolling and the accompanying presumption should not apply to appeal periods in either the judicial or the administrative context." *Id.* at 80a. He explained that "[t]he doctrine of equitable tolling is designed to militate the harsh results that would flow from the strict application of statutes of limitations," and that "[t]he fundamental error in today's decision lies in applying that doctrine to a statute providing a time for appeal." *Ibid.* According to Judge Dyk, that error "traces back to our * * * decision in *Bailey*." *Ibid.* While observing that this Court's intervening cases "have admittedly clouded the 'jurisdictional' nature of appeal periods," Judge Dyk contended that those cases "have not undermined the strictness of the rule for appellate time limits." *Id.* at 81a. He noted that "whether [appeal] provisions are jurisdictional [was] itself under review by [this] Court" in *Bowles* v. *Russell*, 127 S. Ct. 2360 (2007), and that "*Bowles* appears also to present the question whether some form of equitable tolling is available with respect to appeal periods." App., *infra*, 81a-82a n.2. Judge Dyk also suggested that equitable tolling of periods for appellate review "creates a risk of making finality unattainable" and "is [not] necessary in the interests of fairness." *Id.* at 85a.

Judge Dyk also rejected the suggestion that "equitable tolling of appeal periods is necessary in the interests of fairness." App., *infra*, 85a. He explained that, "[u]nlike a potential litigant confronting a statute of limitations, an individual who appeals an adverse decision has already determined to commence a judicial or administrative proceeding and has demonstrated the ability to participate in the process." *Ibid.* Moreover, Judge Dyk continued, as was the case here, "[t]ypically * * * in administrative cases the losing party receives actual notice of the time for appeal." *Ibid.*[1]

REASONS FOR GRANTING THE PETITION

The 7-6 en banc majority of the Federal Circuit erred by holding that the 15-day statutory time limit for filing an appeal with the MSPB from a decision of the Secretary of Labor denying a complaint under the VEOA is subject to equitable tolling. As a preliminary matter, the court of appeals erred by treating the time limit as

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[1] At the same time that he filed his VEOA appeal, respondent also filed a complaint with the MSPB under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301 *et seq.*, alleging that he had been discriminated against on the basis of his military service. The administrative judge determined that respondent had failed to present any evidence demonstrating that his status was a substantial or motivating factor in the Army's ineligibility determination, and denied respondent's request for a hearing. App., *infra*, 114a-123a. The full Board denied review. *Id.* at 111a-113a. The initial court of appeals panel held that a veteran who has filed a USERRA complaint with the MSPB is entitled to a hearing as of right. *Id.* at 98a-100a. The en banc court of appeals granted rehearing on that issue, as well as the VEOA issue discussed above, and held by a 7-6 majority that a USERRA complainant is entitled to a hearing as of right. *Id.* at 23a-28a (plurality opinion); *id.* at 58a-62a (Moore, J., joined by Prost, J., concurring in the result in relevant part). Respondent's USERRA claim is not at issue in this petition.

non-jurisdictional. As this Court reaffirmed just weeks ago in *Bowles* v. *Russell*, 127 S. Ct. 2360 (2007), a statutory time limit governing the transfer of a case from one tribunal to another is jurisdictional, and, as a result, is mandatory and not subject to equitable tolling. Because the en banc court did not have the benefit of the Court's decision in *Bowles* when it decided this case, the Court should vacate and remand for the court of appeals to reconsider its conclusion in light of *Bowles*.

Having erred by holding as a threshold matter that the time limit at issue is non-jurisdictional, the court of appeals further erred by holding that the time limit is subject to equitable tolling under *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990). The statute on its face rebuts any presumption in favor of equitable tolling, because it emphatically provides that a VEOA appeal "in no event" may be brought beyond the 15-day time limit. Congress need go no further in spelling out that a time period is fixed and not subject to equitable tolling. Because the Federal Circuit has exclusive jurisdiction over VEOA appeals, its holding in this case will have nationwide effect. Accordingly, if this Court does not vacate and remand in light of *Bowles*, it should grant plenary review and hold that equitable tolling is unavailable.

A. This Court's Intervening Decision In *Bowles* v. *Russell* Underscores That The Time Limit In Section 3330a(d)(1) Is Jurisdictional And Thus Not Subject To Equitable Tolling

The court of appeals rejected the government's argument that the 15-day statutory time limit for filing a VEOA appeal with the MSPB is jurisdictional and thus not subject to equitable tolling. See App., *infra*, 18a-21a. The court of appeals reached that conclusion, how-

ever, without the benefit of this Court's recent decision in *Bowles*, although Judge Dyk specifically noted that *Bowles* was pending at the time. *Id.* at 81a-82a. Because *Bowles* underscores that the time limit at issue is jurisdictional and clarifies the prior decisions from this Court on which the court of appeals relied in concluding to the contrary, it would be appropriate for this Court to vacate the court of appeals' judgment and remand for reconsideration in light of *Bowles*.

1. Three weeks ago, in *Bowles*, this Court held that a habeas petitioner's failure to file a notice of appeal within the 14-day reopening period specified by 28 U.S.C. 2107(c) (and Federal Rule of Appellate Procedure 4(a)(6)) deprived the court of appeals of jurisdiction. 127 S. Ct. at 2363-2366. The Court began by noting that it had "long held that the taking of an appeal within the prescribed time is mandatory and jurisdictional." *Id.* at 2363 (internal quotation marks and citation omitted); see *id.* at 2362 (stating that "[w]e have long and repeatedly held that the time limits for filing a notice of appeal are jurisdictional in nature"). While acknowledging that "several of [the Court's] recent decisions have undertaken to clarify the distinction between claims-processing rules and jurisdictional rules," the Court explained that "none of [those decisions] calls into question [the Court's] longstanding treatment of statutory time limits for taking an appeal as jurisdictional." *Id.* at 2364.

The Court distinguished its decisions in *Eberhart* v. *United States*, 546 U.S. 12 (2005) (per curiam), and *Kontrick* v. *Ryan*, 540 U.S. 443 (2004), on which the majority below relied, on the ground that those decisions did not involve *statutory* time limits. *Bowles*, 127 S. Ct. at 2364-2365. The Court likewise distinguished its deci-

sions in *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500 (2006), and *Scarborough* v. *Principi*, 541 U.S. 401 (2004), on which the majority below also relied, on the grounds that they involved an employee-numerosity requirement (in the case of *Arbaugh*) and the availability of attorney's fees ancillary to an action as to which the court already had jurisdiction (in the case of *Scarborough*). 127 S. Ct. at 2365. The Court further noted that it had treated the 90-day period for filing petitions for certiorari in civil cases as jurisdictional. *Ibid.*

Applying that understanding, the Court held that, because the statutory 14-day time limit for taking an appeal on reopening was jurisdictional, it was mandatory and not subject to exception. *Bowles*, 127 S. Ct. at 2366-2367. The Court also rejected the habeas petitioner's reliance on the "unique circumstances" doctrine, on the ground that "this Court has no authority to create equitable exceptions to jurisdictional requirements." *Id.* at 2366. The Court noted that Congress could authorize courts to promulgate rules that excuse compliance with statutory time limits, but reiterated that, in the absence of such an authorization, courts "lack present authority to make the exception [the habeas petitioner] seeks." *Id.* at 2367.

2. *Bowles* underscores that the 15-day statutory time limit for filing a VEOA appeal with the MSPB is jurisdictional and thus not subject to equitable tolling. That time limit, like the time limit in *Bowles*, is set out in a statute enacted by Congress, not simply in a rule adopted by a court or tribunal. And the statute establishing that time limit, like the statute in *Bowles*, governs the transfer of a case from one tribunal to another—namely, from the Secretary of Labor to the MSPB—and thus defines the class of cases that the ap-

pellate tribunal is competent to hear.[2] Indeed, the statutory case for treating the time limit here as jurisdictional is if anything stronger than in *Bowles*, because the time limit is contained in the same statutory section that contains the general grant of jurisdiction to the MSPB over VEOA appeals. See 5 U.S.C. 3330a(d)(1); App., *infra*, 58a (Moore, J., dissenting) (noting that "[Section 3330a] is the sole statute providing the Board's jurisdiction over VEOA claims"); cf. *Cowan* v. *United States*, 710 F.2d 803, 805 (Fed. Cir. 1983) (noting that "[the MSPB's] jurisdiction is limited to those areas specifically granted by statute or regulation").

The time limit at issue in this case does concern the appeal of a case from one *administrative agency* to another, rather than from one *court* to another (or from an administrative agency to a court). But that does not render the reasoning of *Bowles* inapposite. To the contrary, administrative agencies are creatures of statute and Congress can constrain administrative agencies, no less than courts, by specifying the circumstances under which agencies have jurisdiction to hear cases, including when agencies are acting in the capacity of appellate tribunals. Cf. *Stone* v. *INS*, 514 U.S. 386, 405 (1995) (stating, without distinguishing between courts and administrative agencies, that "time limits" in "statutory provisions specifying the timing of review * * * are, as we have often stated, mandatory and jurisdictional, and are not subject to equitable tolling") (internal quotation marks and citation omitted); *Joshi* v. *Ashcroft*, 389 F.3d 732, 734 (7th Cir. 2001) (observing that "[t]he emergent distinction * * * is between those deadlines that gov-

[2] As in the Article III context, notice of an appeal to the MSPB divests the Secretary of Labor of jurisdiction over the complaint. See 5 U.S.C. 3330a(d)(3).

ern the transition from one court (*or other tribunal*) to another, which are jurisdictional, and other deadlines, which are not") (emphasis added). Moreover, as both the majority and dissenting opinions in *Bowles* make clear, when Congress imposes a jurisdictional time limit on a tribunal, only Congress may create equitable exceptions to such a time limit. See *Bowles*, 127 S. Ct. at 2366 (noting that "this Court has no authority to create equitable exceptions to jurisdictional requirements"); *id.* at 2368 (Souter, J., dissenting) (noting that, "if a limit is taken to be jurisdictional, meritorious excuse [becomes] irrelevant (unless the statute so provides)").[3]

In reaching the conclusion that the time limit in Section 3330a(d)(1) is not jurisdictional, the court of appeals reasoned that this Court had "clarified that time prescriptions, however emphatic, are not properly typed 'jurisdictional.'" App., *infra*, 19a-20a (internal quotation marks omitted) (citing *Arbaugh*, *Eberhart*, *Scarborough*, and *Kontrick*). Although Judge Dyk noted in his dissent

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[3] Judge Dyk observed that *Bowen* v. *City of New York*, 476 U.S. 467 (1986), "is in some tension" with this Court's cases establishing that statutory time limits for appeals are jurisdictional and thus mandatory. App., *infra*, 81a n.1. In *Bowen*, the Court held in passing that the 60-day limit in 42 U.S.C. 405(g) for commencing a civil action in federal district court challenging an administrative determination as to Social Security benefits "is not jurisdictional." 476 U.S. at 478. As Judge Dyk explained, however, the *Bowen* Court found that 42 U.S.C. 405(g) constitutes a "statute of limitations" (and not a statute specifying a period for review). 476 U.S. at 478-479. The time limit at issue in this case, like the one in *Bowles*, is explicitly delineated as a time limit on "appeal[s]," 5 U.S.C. 3330a(d)(1), and *Bowen* is at a minimum distinguishable on that basis. Accordingly, *Bowen* does not support the court of appeals' decision holding that the time limit in Section 3330a(d)(1) is non-jurisdictional, and does not undermine the force of *Bowles* as applied to that time limit.

that *Bowles* was pending (and that the majority's reading of this Court's precedents was in any event wrong), see *id.* at 81a-82a & n.1, the court of appeals did not have the benefit of the Court's decision in *Bowles* at the time it issued its opinion—and *Bowles* makes clear that "none of [the cited decisions] calls into question [the Court's] longstanding treatment of statutory time limits for taking an appeal as jurisdictional." 127 S. Ct. at 2364.[4] At a minimum, this Court should therefore vacate the court of appeals' judgment and remand so that the court of appeals can reconsider whether, in light of *Bowles*, the time limit in Section 3330a(d)(1) is jurisdictional, and, as a result, is mandatory and not subject to equitable tolling.

B. Even If The Time Limit In Section 3330a(d)(1) Were Non-Jurisdictional, It Would Not Be Subject To Equitable Tolling

The court of appeals further erred by holding that the statutory time limit at issue is subject to equitable tolling. That holding cannot be squared with this Court's decisions concerning the circumstances under which equitable tolling is available for non-jurisdictional time limits, much less with the unequivocal "in no event" command of Section 3330a(d)(1).

1. In *Irwin, supra*, this Court held that "the same rebuttable presumption of equitable tolling applicable to

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[4] The court of appeals also relied on its earlier decision in *Bailey* v. *West*, 160 F.3d 1360 (Fed. Cir. 1998) (en banc), in which it held that the 120-day statutory time limit for filing an appeal to the Court of Appeals for Veterans Claims from the Board of Veterans' Appeals was subject to equitable tolling. *Id.* at 1368. This Court's decision in *Bowles*, however, bolsters Judge Moore's conclusion (in her dissenting opinion below) that *Bailey* is out of step with the Court's precedents. See App., *infra*, 55a n.5.

suits against private defendants should also apply to suits against the United States." 498 U.S. at 95-96. The court of appeals held that such a presumption was applicable to the time limit in Section 3330a(d)(1) because "[respondent's] VEOA claim is sufficiently analogous to private actions brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*" App., *infra*, 8a-9a. Assuming that the *Irwin* presumption is applicable here, the court of appeals erred by holding that the presumption was not rebutted.[5]

As this Court has explained, the relevant inquiry under *Irwin* is whether "there [is] good reason to believe that Congress did *not* want the equitable tolling doctrine to apply." *United States* v. *Brockamp*, 519 U.S. 347, 350 (1997). As with all questions of statutory interpretation, that inquiry naturally begins with the text of the statute, and, where equitable tolling would be "inconsistent with the text of the relevant statute," it is not permitted. *Young* v. *United States*, 535 U.S. 43, 49 (2002) (quoting *United States* v. *Beggerly*, 524 U.S. 38, 48 (1998)). Thus, as this Court has emphasized, where a statute "sets forth its time limitations in unusually emphatic form," equitable tolling is not warranted. *Brockamp*, 519 U.S. at 350.

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[5] Although a "precise private analogue" is not required in order to invoke the *Irwin* presumption, *Scarborough*, 541 U.S. at 422, the court of appeals also erred by holding that an administrative appeal under the VEOA was sufficiently analogous to a civil action under Title VII, for which equitable tolling is available, to trigger the *Irwin* presumption. Unlike USERRA (which contains no time limit on administrative complaints to the MSPB), the VEOA does not directly prohibit *discrimination* against veterans, but instead merely provides a mechanism for enforcement of veterans' *preference* rights.

Section 3330a(d)(1) contains such "unusually emphatic" language. Rather than providing merely that a VEOA appeal must be filed within 15 days (or that a VEOA appeal shall be barred unless it is filed within 15 days), see *Irwin*, 498 U.S. at 94-95 (discussing statutes worded in that manner), Section 3330a(d)(1) provides that a VEOA appeal "in no event * * * may * * * be brought * * * later than 15 days" after the claimant receives written notice from the Secretary of Labor. As Judge Moore noted in her dissenting opinion, "[s]hort of saying 'equitable tolling shall not apply,' Congress could not have been clearer." App., *infra*, 47a. A reading of Section 3330a(d)(1) that permitted equitable tolling would render the "in no event" language effectively superfluous—in contravention of the fundamental canon of statutory construction that "a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 36 (1992).

Moreover, in other federal statutes establishing filing deadlines, the phrase "in no event" has consistently been strictly construed. Several major statutes provide that an action must be brought within a specified limitations period and "in no event" may be brought outside a longer period of repose. See, *e.g.*, 15 U.S.C. 77m (Securities Act of 1933); 15 U.S.C. 78i(e) (Securities Exchange Act of 1934); 31 U.S.C. 3731 (False Claims Act). In *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991), this Court held that neither the one-year limitations period nor the three-year repose period of the Securities Act of 1933 was subject to equitable tolling. *Id.* at 363. That statute provides, in relevant part, that "[i]n no event shall any * * * action be brought * * * more than three years after the security

was bona fide offered to the public." 15 U.S.C. 77m. The Court reasoned that "the purpose of the 3-year limitation is clearly to serve as a cutoff." *Lampf*, 501 U.S. at 363. Lower courts construing similarly worded statutes have reached the same result. See, *e.g.*, *Cook* v. *Deltona Corp.*, 753 F.2d 1552, 1562 (11th Cir. 1985); *Aldrich* v. *McCulloch Props., Inc.*, 627 F.2d 1036, 1042-1043 (10th Cir. 1980).

2. In reading Section 3330a(d)(1) to permit equitable tolling, the court of appeals relied heavily on this Court's decisions in *Brockamp* and *Beggerly*. See App., *infra*, 12a-14a, 16a-17a. In each of those cases, however, the Court was construing statutes that, at least by their express terms, did not emphatically preclude equitable tolling. In *Brockamp*, the statute at issue stated that a "[c]laim for * * * refund * * * of any tax * * * shall be filed by the taxpayer" within a specified time period (and repeated that time limit on several occasions). 26 U.S.C. 6511(a). In *Beggerly*, the statute provided that a quiet title action "shall be barred unless it is commenced within twelve years of the date upon which it accrued." 28 U.S.C. 2409a(g). Notwithstanding that unremarkable statutory language, the Court held in each instance that other factors compelled the conclusion that, despite *Irwin*, the time limits at issue were not subject to equitable tolling. See *Brockamp*, 519 U.S. at 350-354; *Beggerly*, 524 U.S. at 48-49.

In this case, the court of appeals dismissed "the statute's technical language" as "little more than a neutral factor in our analysis," App., *infra*, 10a, and instead held that Section 3330a(d)(1)'s more emphatic "in no event" language was insufficient, in the absence of at least some of the other factors cited in *Brockamp* and *Beggerly*, to overcome the *Irwin* presumption in favor of equitable

tolling. As Judge Gajarsa conceded in his concurring opinion, however, that approach comes perilously close to requiring Congress to state in the text of the statute that "equitable tolling shall not apply" in order to preclude tolling, *id.* at 40a—a "magic words" requirement that no time limit currently contained in the United States Code would satisfy. There is no basis in this Court's cases for such an approach, which would be at odds with the fact that "the time limits imposed by Congress in a suit against the government involve a waiver of sovereign immunity." *Irwin*, 498 U.S. at 96.

The court of appeals compounded its error by misapplying some of the factors cited in *Brockamp* and *Beggerly* in analyzing the time limit in Section 3330a(d)(1). The court first asserted that "section 3330a is not detailed," App., *infra*, 16a, and that "section 3330a's fairly simple language is not technical." *Id.* at 17a. That language, however, is no less technical than the relevant language of the statutes at issue in *Brockamp* and *Beggerly*, and it appears in the context of a complex and detailed regime for the processing of VEOA claims. The court next asserted that "section 3330a does not contain explicit exceptions to the two filing deadlines." *Ibid.* The fact that Congress specified that a VEOA appeal "in no event * * * may * * * be brought" outside the 15-day limit, however, makes clear that Congress intended that there be *no* exceptions to that limit, and did not intend to permit an "unmentioned, open-ended, 'equitable' exception[] into the statute that it wrote." *Brockamp*, 519 U.S. at 352. Finally, the court asserted that "the 15-day filing period under section 3330a(d)(1)(B) is extraordinarily short." App., *infra*, 17a. But the brevity of a filing period is not sufficient to overcome a textual declaration that it shall "in no event" be extended, and,

in any event, as Judge Dyk explained, the time limit applies to a class of individuals who have "already determined to commence * * * administrative proceedings and [have] demonstrated the ability to participate in the process." *Id.* at 85a.

In addition, to the extent that the court of appeals considered extratextual factors in concluding that the *Irwin* presumption had not been overcome, it erred by failing to recognize that Section 3330a(d)(1) establishes a time limit for appellate review, rather than a time limit for the initiation of a claim. As Judge Dyk noted in dissent, whereas "statutes of limitations merely govern the time when a case is first filed," "equitable tolling of appeal periods creates a risk of making finality unattainable." App., *infra*, 84a. Accordingly, to the extent that lower courts (like the court below) have held that appellate time limits are non-jurisdictional, they have generally held (unlike the court below) that such time limits are mandatory and not subject to equitable tolling. See *id.* at 82a-83a (citing cases). Thus, while it is unquestionably true, as the majority opinion noted, that "[t]he purpose of the VEOA is to assist veterans in obtaining gainful employment with the federal government and to provide a mechanism for enforcing this right," *id.* at 18a, it does not follow that Congress would have intended to permit tolling of the period for *appealing* a decision on a VEOA claim, even assuming that it did intend to permit tolling of the period for *filing* a VEOA claim in the first place (despite the undoubted need for prompt resolution of grievances relating to federal employment). Nor would such a rule be inequitable where, as here, the VEOA claimant was provided with notice of the period

for appeal when his initial complaint was dismissed. See *id.* at 140a-141a.[6]

3. Finally, having already relied on the VEOA's purpose of assisting veterans in concluding that the time limit in Section 3330a(d)(1) is subject to equitable tolling, the court of appeals reasoned that "the canon that veterans' benefits statutes should be construed in the veteran's favor" supported that conclusion. App., *infra*, 22a. Because the text of Section 3330a(d)(1) unambiguously forecloses equitable tolling, however, that canon is unavailing. See *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (concluding that application of that canon would "distort the language of [the] provisions [at issue]"). Moreover, as Judge Dyk explained, "interests of fairness" do not support the equitable-tolling argument advanced by respondent here. App., *infra*, 85a.

C. The Question Presented Is Important And Warrants Review

The question whether the 15-day statutory time limit for filing a VEOA appeal with the MSPB is subject to equitable tolling is a recurring one of threshold importance to the administration of the VEOA's remedial

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[6] Prior to the court of appeals' decision in this case, the MSPB had taken the position that the 15-day time limit in Section 3330a(d)(1) is mandatory. See *Williams* v. *Department of the Navy*, 94 M.S.P.R. 400, 410 (2003), aff'd, 89 Fed. Appx. 714 (Fed. Cir. 2004); 65 Fed. Reg. 5411 (2000). Although the court of appeals did not address whether the MSPB's interpretation of the statute was entitled to deference, the fact that the MSPB has consistently taken the position that equitable tolling is not available bolsters the conclusion that follows from the statute's plain text. Cf. *Krizman* v. *MSPB*, 77 F.3d 434, 439-440 (Fed. Cir. 1996) (deferring to MSPB's determination that a Postal Service employee failed to establish "good cause" for the untimely filing of his appeal).

scheme. Because the Federal Circuit has exclusive jurisdiction over appeals from MSPB decisions in VEOA cases, see 28 U.S.C. 1295(a)(9), no circuit conflict will arise on the availability of equitable tolling under Section 3330a(d)(1), and the Federal Circuit's holding that equitable tolling is available will have nationwide effect. The MSPB has already begun reopening VEOA appeals previously dismissed as untimely in order to determine whether equitable tolling is warranted. See *Hayes* v. *Department of the Army*, 2007 M.S.P.B. No. 157 (June 13, 2007); *Seward* v. *Department of Veterans Affairs*, 2007 M.S.P.B. No. 152 (June 12, 2007).

More broadly, the en banc Federal Circuit's decision, which employs an unduly broad methodology for determining whether equitable tolling is available, could have pernicious effects in the interpretation of other filing deadlines within the Federal Circuit's exclusive purview. See, *e.g.*, 5 U.S.C. 1214(a)(3) (period for appeal to the MSPB under the Whistleblower Protection Act); 29 U.S.C. 255 (limitations period for bringing a claim in the Court of Federal Claims under the Fair Labor Standards Act); 41 U.S.C. 609(a)(3) (same under the Contract Disputes Act). The Federal Circuit's extensive reliance in this case on its earlier decision in *Bailey* amply demonstrates that mistaken rulings about equitable tolling are not easily cabined to the specific statutory scheme that spawned the erroneous rule. Accordingly, if this Court does not vacate and remand for *Bowles*, it should grant plenary review to clarify the proper application of the *Irwin* presumption and decide whether the

time limit in Section 3330a(d)(1) is subject to equitable tolling.[7]

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration in light of *Bowles* v. *Russell*, 127 S. Ct. 2360 (2007). In the alternative, the petition should be granted and the case set for briefing and oral argument.

Respectfully submitted.

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[7] In *John R. Sand & Gravel Co.* v. *United States*, cert. granted, No. 06-1164 (May 29, 2007), the Court is considering whether the six-year limitations period established by 28 U.S.C. 2501 is jurisdictional (and thus must be considered by a court even if it is not raised by the parties). It would be unnecessary to hold the petition in this case pending the disposition of *John R. Sand & Gravel*, because that case does not present any question concerning the applicability (or application) of the presumption in favor of equitable tolling.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 05-3077

JOHN E. KIRKENDALL, PETITIONER

v.

DEPARTMENT OF THE ARMY, RESPONDENT

Mar. 7, 2007

Before MICHEL, Chief Judge, NEWMAN, MAYER, Circuit Judges, PLAGER, Senior Circuit Judge, LOURIE, RADER, SCHALL, BRYSON, GAJARSA, LINN, DYK, PROST, and MOORE, Circuit Judges.

MAYER, Circuit Judge, announced the judgment of the court, and filed the opinion for the court with respect to Part I, in which MICHEL, Chief Judge, NEWMAN, Circuit Judge, PLAGER, Senior Circuit Judge, and SCHALL, GAJARSA, and LINN, Circuit Judges, join, and filed an opinion with respect to Part II, in which MICHEL, Chief Judge, NEWMAN, Circuit Judge, PLAGER, Senior Circuit Judge, and GAJARSA, Circuit Judge, join. GAJARSA, Circuit Judge, filed a concurring opinion, in which NEWMAN, Circuit Judge, and PLAGER, Senior Circuit Judge, join. MOORE, Circuit Judge, filed an opinion concurring in part and dissenting in part, in which PROST, Circuit Judge, joins, and in which LOURIE, RADER, BRYSON, and DYK, Circuit Judges, join in part. BRYSON,

Circuit Judge, filed a dissenting opinion, in which LOURIE, RADER, BRYSON, and DYK, Circuit Judges, join, and in which SCHALL and LINN, Circuit Judges, join in part. DYK, Circuit Judge, filed a dissenting opinion.

MAYER, Circuit Judge.

John E. Kirkendall appeals the decision of the Merit Systems Protection Board, which dismissed his claims that he had been discriminated against in violation of the Veterans Employment Opportunities Act of 1998 ("VEOA"), 5 U.S.C. § 3330a (2000), and the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4311 (2000). *Kirkendall v. Dep't of the Army,* AT-3443-02-0622-I-1, AT-0330-02-0621-B-1, 2004 WL 2359294 (MSPB Oct. 13, 2004). Because the VEOA is subject to equitable tolling and Kirkendall is entitled to a hearing on his USERRA claim, we reverse and remand.

Background

Kirkendall, a 100% disabled veteran who suffers from organic brain syndrome, applied for a position as a Supervisory Equipment Specialist (Aircraft), GS-1670-12, with the Department of the Army ("agency") at Fort Bragg, North Carolina. Kirkendall's service and resulting disability entitled him to a 10-point preference. He included a resume with his application, which indicated, *inter alia,* that he had admirably served as the Commander of a Direct Support Platoon at Fort Bragg, and as a Force Integration Officer and an Executive Officer/Commander at Fort Bliss, Texas. In addition, Kirkendall's resume listed numerous, specific duties he had performed, as well as several technical courses he had taken while in the Army. On January 5, 2000, the

agency found that Kirkendall's application lacked sufficient detail regarding his experience and rated him ineligible for the position. Kenneth Black, also a 10-point preference eligible veteran, was chosen to fill the position.

Kirkendall filed several complaints with the agency contesting his non-selection, all of which were denied. He then filed a formal complaint with the Department of Labor ("DoL") claiming a violation of his veterans' preference rights and discrimination based on his disability. On November 29, 2001, DoL rejected the complaint because it had not been filed within 60 days of the agency's alleged violation as required by 5 U.S.C. § 3330a(a)(2)(A). On June 13, 2002, Kirkendall appealed to the Merit Systems Protection Board.

The administrative judge ("AJ") dismissed Kirkendall's USERRA claim for failure to state a claim, and dismissed his VEOA claim on the ground that where DoL rejects a VEOA complaint as untimely, the board has no authority to decide whether DoL should have waived the 60-day deadline. The AJ dismissed the VEOA claim on the further ground that Kirkendall failed to appeal DoL's rejection to the board within 15 days, as required by 5 U.S.C. § 3330a(d)(1)(B), and that the 15-day deadline could not be equitably relaxed. The board affirmed the AJ's decision that the VEOA claim was precluded for failure to timely file, but reversed the determination that Kirkendall had failed to state a proper claim for relief under USERRA. Rather, the board held that Kirkendall's assertion that he was not selected based on his status as a disabled veteran was cognizable. On remand, the AJ held, without a hearing, that Kirkendall had offered no proof that his veteran

status was a substantial or motivating factor in his non-selection. Kirkendall again petitioned the full board for review, but review was denied, and the AJ's remand decision became final.

Kirkendall appealed, and a panel of this court reversed and remanded the decision, holding that the board erred by failing to toll the filing periods contained in 5 U.S.C. § 3330a and by refusing to hold a hearing on his USERRA claim. *Kirkendall v. Dep't of the Army*, 412 F.3d 1273 (Fed. Cir. 2005). The court then granted the government's petition for rehearing *en banc*, and vacated the panel's opinion. *Kirkendall v. Dep't of the Army*, 159 Fed. Appx. 193 (Fed. Cir. 2006) (per curiam order).

The order granting *en banc* review asked the parties to brief three issues: (1) Is the 15-day period for filing appeals to the Merit Systems Protection Board set forth in 5 U.S.C. § 3330a(d)(1)(B) subject to equitable tolling? (2) Is the 60-day period for filing a claim with the Secretary of Labor set forth in 5 U.S.C. § 3330a(a)(2)(A) subject to equitable tolling? (3) Are all veterans who allege a USERRA violation entitled to a hearing under 5 U.S.C. § 7701? *Id.* at 194.[1]

Discussion

Preliminarily, we find no merit in the government's suggestion that DoL's rejection of Kirkendall's complaint as untimely under 5 U.S.C. § 3330a(a)(2)(A) constitutes a failure to exhaust administrative remedies depriving both the board and this court of jurisdiction

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[1] We are grateful to Theodore B. Olson, Thomas H. Dupree, Jr., and Henry C. Whitaker of Gibson, Dunn & Crutcher LLP, who represented John E. Kirkendall pro bono at the court's request.

over his VEOA claim.[2] Because the question of whether section 3330a(a)(2)(A) is subject to equitable tolling was at issue, the board had the authority and the obligation to consider whether DoL's action was in error. *See Bowen v. City of N.Y.*, 476 U.S. 467, 482, 106 S. Ct. 2022, 90 L. Ed. 2d 462 (1986) (excusing claimants' failure to exhaust their administrative remedies for the same reasons the Court found the underlying timeliness requirement subject to equitable tolling); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982) ("[F]iling a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling."); *Garcia v. Dep't of Homeland Sec.*, 437 F.3d 1322, 1331 (Fed. Cir. 2006) (en banc) (The board has "jurisdiction to determine its jurisdiction.") (quoting *Cruz v. Dep't of Navy*, 934 F.2d 1240, 1244 (Fed. Cir. 1991) (en banc)). To conclude otherwise would foreclose judicial review of DoL's rejection, despite the possibility of tolling, and conflict with the

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[2] Before the merits panel, the government argued that the board was without jurisdiction to consider Kirdendall's VEOA appeal because of his alleged failure to exhaust administrative remedies. We addressed that argument, and rejected it. In its petition for rehearing *en banc*, the government did not renew this argument, and we did not grant rehearing on it. As a general rule, the scope of our *en banc* review is limited to the issues set out in the *en banc* order. *Accord United States v. Padilla*, 415 F.3d 211, 217 (1st Cir. 2005) (en banc); *Brown v. Stites Concrete, Inc.*, 994 F.2d 553, 557 (8th Cir. 1993) (en banc). It is, therefore, inappropriate for the government now to reargue exhaustion. However, because exhaustion calls into question our jurisdiction over the tolling issues, we address it to clarify that there are no jurisdictional impediments.

"strong presumption that Congress intends judicial review of administrative action." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670, 106 S. Ct. 2133, 90 L. Ed. 2d 623 (1986); *see also Conoco, Inc. v. U.S. Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1585 (Fed. Cir. 1994) ("It is well established that judicial review of agency action is to be presumed, absent clear and convincing evidence of Congressional intent to the contrary."). We, of course, have authority to review the board's decision under 28 U.S.C. § 1295(a)(9).

I. *Equitable Tolling*

In deciding whether the timing provisions at issue here are subject to equitable tolling, we are guided by *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990). There the Supreme Court established the presumption that equitable tolling is available in suits against the government when permitted in analogous private litigation. *Id.* at 95-96, 111 S. Ct. 453. A precise private analogue is not required; only that there be sufficient similarity between the suits. *See Scarborough v. Principi*, 541 U.S. 401, 422, 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004) ("Litigation against the United States exists because Congress has enacted legislation creating rights against the Government, often in matters peculiar to the Government's engagements with private persons—matters such as the administration of benefit programs. Because many statutes that create claims for relief against the United States or its agencies apply only to Government defendants, *Irwin's* reasoning would be diminished were it instructive only in situations with a readily identifiable private-litigation equivalent.").

In so establishing the presumption in favor of equitable tolling, the Court recognized that once the government has consented to be sued through a waiver of sovereign immunity, "making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver." *Irwin*, 498 U.S. at 95, 111 S. Ct. 453. Instead, "[s]uch a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation." *Id.* Moreover, it cautioned that "we must be careful not to assume the authority to narrow the waiver that Congress intended, or construe the waiver unduly restrictively." *Id.* at 94, 111 S. Ct. 453 (quoting *Bowen*, 476 U.S. at 479, 106 S. Ct. 2022) (internal quotation marks omitted).

However, in order to honor congressional intent, the *Irwin* presumption can be rebutted if "there [is] good reason to believe that Congress did *not* want the equitable tolling doctrine to apply." *United States v. Brockamp*, 519 U.S. 347, 350, 117 S. Ct. 849, 136 L. Ed. 2d 818 (1997); *see also Young v. United States*, 535 U.S. 43, 49, 122 S. Ct. 1036, 152 L. Ed. 2d 79 (2002) ("It is hornbook law that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute.") (citations and internal quotation marks omitted); *United States v. Beggerly*, 524 U.S. 38, 48, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998) ("Equitable tolling is not permissible where it is inconsistent with the text of the relevant statute."). We have interpreted this to mean that "absent a *clear contrary intent* of Congress to limit jurisdiction created by a particular statute," we will apply the presumption. *Bailey v. West*, 160 F.3d 1360, 1368 (Fed. Cir. 1998) (en

banc) (emphasis added). To make this determination, we look to the factors enumerated by the Supreme Court in *Brockamp:* "the statute's detail, its technical language, its multiple iterations of the limitations period in procedural and substantive form, its explicit inclusion of exceptions, and its underlying subject matter." *Brice v. Sec'y of Health & Human Servs.*, 240 F.3d 1367, 1372 (Fed. Cir. 2001) (citing *Brockamp,* 519 U.S. at 350-52, 117 S. Ct. 849). Every factor need not be present to find that Congress intended to preclude tolling, *Brice,* 240 F.3d at 1372-73, and while unlikely, it is possible for a single factor to be dispositive.

In sum, to determine the availability of equitable tolling in suits against the government, we engage in a two-part inquiry. First, we determine whether such tolling is available in a sufficiently analogous private suit. If so, we look to the *Brockamp* factors to determine whether Congress expressed a "clear intent" that equitable tolling not apply.

A.

Turning to the matter at hand, the purpose of the VEOA is to provide preference eligible veterans with a method for seeking redress where their veterans' preference rights have been violated in hiring decisions made by the federal government. Where a veteran establishes a violation, the agency is ordered to comply with the veterans' preference statutes and award compensation for any lost wages or benefits suffered by reason of the violation. 5 U.S.C. § 3330c(a). Moreover, if the violation is found to be willful, the agency is ordered to pay the aggrieved veteran "an amount equal to backpay as liquidated damages." *Id.* Accordingly, we find that Kirkendall's VEOA claim is sufficiently analogous

to private actions brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, to invoke the presumption that equitable tolling applies here. *See Irwin*, 498 U.S. at 95, 111 S. Ct. 453 (holding that "the statutory time limits applicable to lawsuits against private employers under Title VII are subject to equitable tolling"); *Brice*, 240 F.3d at 1372 (holding that claims under the Vaccine Act are sufficiently similar to tort claims so as to invoke the *Irwin* presumption). This leaves only the question of whether Congress has evinced a clear intent to rebut that presumption.

B.

Kirkendall missed both relevant timing provisions under 5 U.S.C. § 3330a. Therefore, if either period is not subject to equitable tolling, his VEOA claim is barred. Because the government concedes that 5 U.S.C. § 3330a(a)(2)(A)[3] is subject to equitable tolling, and because, if anything, it is comparatively less emphatic, less detailed, and less technical than 5 U.S.C. § 3330a(d)(1),[4]

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[3] 5 U.S.C. § 3330a(a)(2)(A) provides:

A complaint under this subsection must be filed within 60 days after the date of the alleged violation.

[4] 5 U.S.C. § 3330a(d)(1) provides:

If the Secretary of Labor is unable to resolve a complaint under subsection (a) within 60 days after the date on which it is filed, the complainant may elect to appeal the alleged violation to the Merit Systems Protection Board in accordance with such procedures as the Merit Systems Protection Board shall prescribe, *except that in no event may any such appeal be brought*—

(A) before the 61st day after the date on which the complaint is filed; or

we begin our analysis with section 3330a(d)(1). The government argues, based primarily on section 3330a(d)(1)'s "in no event" clause, that Congress manifested a clear intent to rebut the *Irwin* presumption. We disagree.

While the "in no event" clause is certainly strong, when the statute's language is considered as a whole and that clause is evaluated in context, the statute's technical language is little more than a neutral factor in our analysis under *Brockamp*. When taken together with the remaining factors, it certainly does not operate to rebut the *Irwin* presumption. To begin, the clause at issue, "except that in no event," introduces section 3330a(d)(1)(A), which provides that an appeal may not be brought "before the 61st day after the date on which the complaint is filed." Because section 3330a(d)(1) explicitly stipulates that the Secretary of Labor is to have 60 days to resolve veterans' VEOA complaints before they may seek redress from the board, the clause primarily operates to emphasize Congress' intent to provide a 60-day window left exclusively for DoL review. Because the "in no event" clause first introduces a timing requirement that is not a "deadline" that a complainant can "miss" in a manner giving rise to a late filing, which would thereby invoke considerations of equitable tolling, that clause can hardly be viewed as either clear or emphatic evidence of Congress' intent to foreclose equitable tolling under section 3330a(d)(1)(B).

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later than 15 days after the date on which the complainant receives written notification from the Secretary under subsection (c)(2).

(emphasis added).

Moreover, *Irwin*, 498 U.S. at 95, 111 S. Ct. 453, which "adopt[ed] a more general rule to govern the applicability of equitable tolling in suits against the Government," cautioned against reading too much into seemingly stringent language setting forth a statute's timing requirements. There, the Supreme Court found equitable tolling equally available in two statutes providing for actions against the government, one of which stated, "[w]ithin thirty days . . . an employee . . . *may file* a civil action," while the other provided, "[e]very claim . . . *shall be barred* unless the petition . . . is filed . . . within six years." *Id.* at 94-95, 111 S. Ct. 453 (emphases added). As the Court explained, "An argument can undoubtedly be made that the latter language is more stringent than the former, but we are not persuaded that the difference between them is enough to manifest a different congressional intent with respect to the availability of equitable tolling." *Id.*

Lending additional support, *Bailey v. Glover*, 21 Wall. 342, 88 U.S. 342, 22 L. Ed. 636 (1874), involved statutory language that is decidedly analogous to that found here, and further illustrates the limited role that these more subtle distinctions in Congress' choice of language play in a court's analysis into whether it may equitably relax a deadline. There, the Supreme Court allowed a plaintiff's late-filed claim to proceed despite statutory language that provided, "*no suit* at law or in equity *shall in any case be maintainable* . . . in any court whatsoever, unless . . . brought within two years." *Id.* at 344, 88 U.S. 342 (emphasis added). While *Bailey v. Glover* specifically relates to claim accrual, not equitable tolling, the Supreme Court nevertheless cites it in *Young*, 535 U.S. at 49, 122 S. Ct. 1036, to support the proposition that limitation periods are customarily

subject to equitable tolling, unless it "would be 'inconsistent with the text of the relevant statute.'" (citations omitted). In other words, despite the statute's admonishment that "no suit . . . shall in any case be maintainable," the Court, nonetheless, found that equitable relief was not inconsistent.

With respect to the propriety of applying *Bailey v. Glover,* to an equitable tolling case, the Supreme Court also cited it in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350, 363, 111 S. Ct. 2773, 115 L. Ed. 2d 321 (1991), as a case relating to equitable tolling. Moreover, *Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231, 231, 79 S. Ct. 760, 3 L. Ed. 2d 770 (1959), which was cited in *Irwin,* held that despite the statutory command, "No action shall be maintained . . . unless commenced within three years from the day the cause of action accrued," because the defendant's fraud caused the plaintiff to let the filing period lapse, the defendant was equitably estopped from using the late filing to bar the action. *Glus* is an equitable estoppel case, but *Irwin* relied on it for the proposition that, "We have allowed *equitable tolling* in situations . . . where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." 498 U.S. at 96 n.4, 111 S. Ct. 453 (emphasis added). Certainly, the availability of the various equitable remedies for relaxing limitations periods are governed by differing considerations, but as the Supreme Court makes clear, these remedies are sufficiently similar that precedents relating to the availability of one are applicable to the others.

In addition, further analysis of *Brockamp* illustrates the error and weakness in the government's reliance on

the "in no event" clause. The statute at issue there, 26 U.S.C. § 6511, provides that a "[c]laim for . . . refund . . . *shall be filed* . . . within 3 years." 519 U.S. at 349-54, 117 S. Ct. 849. Despite the similarity between the "shall be filed" language and the "shall be barred" clause in *Irwin*, where equitable tolling was found to apply, *Brockamp* found equitable tolling unavailable under section 6511. It even characterized the manner in which the statute set forth time limitations as "unusually emphatic." 519 U.S. at 350, 117 S. Ct. 849. This apparent contradiction is readily explained, however, because the Court paid little, if any, attention to the specific language introducing section 6511's timing provision. Instead, the Court based its conclusion on the fact that the statute "sets forth its limitations in a highly detailed technical manner, that, linguistically speaking, cannot easily be read as containing implicit exceptions. Moreover, § 6511 reiterates its limitations several times in several different ways." *Id.* at 350-51, 117 S. Ct. 849. It further elaborated that "§ 6511 sets forth explicit exceptions to its basic time limits, and those very specific exceptions do not include 'equitable tolling'" and "to read an 'equitable tolling' provision into these provisions, one would have to assume an implied exception for tolling virtually every time a number appears. To do so would work a kind of linguistic havoc." *Id.* at 351-52, 117 S. Ct. 849. The Court also pointed to policy considerations underscoring the need for repose and administrative simplicity in tax cases. In other words, it was a comprehensive view of the statute as a whole and the purpose of the statutory scheme that drove the analysis, not rudimentary reliance on the seemingly, or not so seemingly, stringent nature of the language introducing the statute's timing provisions.

The Supreme Court's decision in *Lampf* further illuminates our discussion. Despite the fact that the statute at issue there, 15 U.S.C. § 77m, contains an "in no event" clause, that specific language did not play a significant role in the Court's holding that equitable tolling was not available. Instead, as in *Brockamp,* it relied heavily on the statute's highly technical structure and its explicit allowance for "tolling" within the statute.[5] *See* 501 U.S. at 363, 111 S. Ct. 2773; *see also Beggerly,* 524 U.S. at 48, 118 S. Ct. 1862 (finding that judicially provided equitable tolling was unavailable because the Quiet Title Act, 28 U.S.C. § 2409a, by providing that the 12-year statute of repose will not "begin to run until the plaintiff 'knew or should have known of the claim of the United States,' *has already effectively allowed for equitable tolling*") (emphasis added). Indeed, the provision at issue in *Lampf* provides that suits must be brought either within one year from discovery of the facts constituting a violation, or within the three-year "period of repose," i.e., the explicit exception providing for "tolling," which runs

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[5] 15 U.S.C. § 77m provides:

> No action shall be maintained to enforce any liability created under [section 11] or [section 12(a)(2)] unless brought within one year after the discovery of the untrue statement or the omission, *or after such discovery should have been made by the exercise of reasonable diligence,* or, if the action is to enforce a liability created under [section 12(a)(1)], unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under [section 11] or [section 12(a)(1)] more than three years after the security was bona fide offered to the public, or under [section 12(a)(2)] more than three years after the sale.

(emphasis added).

from the date of the relevant transaction. Therefore, the Court said, "Because the purpose of the 3-year limitation is clearly to serve as a cutoff, we hold that tolling principles do not apply to that period." 501 U.S. at 363, 111 S. Ct. 2773.

Therefore, given (1) *Irwin*'s command that courts should be wary of allowing subtle distinctions in Congress' choice of language to unduly drive the inquiry into its intent, especially when viewed in light of the Supreme Court analysis in *Lampf* and *Brockamp*; (2) the substantial similarity between the "in no event" language here and the language in *Bailey v. Glover*; and (3) the purpose of the "in no event" clause within section 3330a(d)(1), we find that the statutory language itself is not unusually emphatic. Rather, in this context, it is analogous to the statutory language of "barred" and "shall be filed" found in *Glus*, 359 U.S. at 231, 79 S. Ct. 760; *Irwin*, 498 U.S. at 95, 111 S. Ct. 453; *Bailey v. West*, 160 F.3d at 1361; and *Former Employees of Sonoco Products Co. v. Chao*, 372 F.3d 1291, 1293 (Fed. Cir. 2004)—all cases in which the relevant statutes were found to be subject to equitable tolling. Because the "in no event" language is of limited, if any, special importance, we firmly reject the government's contention that allowing equitable tolling here renders that language superfluous. *Cf. Brown v. Gardner*, 513 U.S. 115, 120, 115 S. Ct. 552, 130 L. Ed. 2d 462 (1994) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting

Russello v. United States, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983)).[6]

Consistent with *Irwin*, we perceive no meaningful difference in Congress' intent with respect to the availability of equitable tolling in the statutes at issue here, despite the fact that arguments can undoubtedly be made in support of the proposition that the "in no event" language under section 3330a(d)(1) is more stringent than the "must be filed" language of section 3330a(a)(2)(A). *See* 498 U.S. at 94-95, 111 S. Ct. 453.

Analysis of the remaining *Brockamp* factors gives us the firm and definite conviction that Congress did not intend to override the *Irwin* presumption. First, section 3330a is not detailed. This is especially true in comparison with other administrative schemes held subject to equitable tolling, such as Title VII, *Irwin*, 498 U.S. at

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[6] An attempt to draw a distinction between the "in no event" language from section 3330a(d)(1)(B) and the "must be filed" language of section 3330a(a)(2)(A), *see post*, separate opinion of Moore, J., is inconsistent with *Irwin*. Moreover, the circuit court precedents upon which it relies to make this distinction are all either irrelevant or cumulative of Supreme Court precedents considered above. *See Dubuc v. Johnson*, 314 F.3d 1205 (10th Cir. 2003) (the statute at issue, 28 U.S.C. § 1915(g), does not involve a timing provision); *Caviness v. DeRand Res. Corp.*, 983 F.2d 1295, 1300-02 (4th Cir. 1993) (interprets the statute at issue in *Lampf*); *Short v. Belleville Shoe Mfg.*, 908 F.2d 1385 (7th Cir. 1990) (same); *Aldrich v. McCulloch Props. Inc.*, 627 F.2d 1036 (10th Cir. 1980) (the decision predates *Irwin*, and the statute at issue, 15 U.S.C. § 1711, is analogous to that in *Lampf*, i.e., it contains a two-tiered timing structure with a three-year period of repose); *Hodgson v. Int'l Printing Pressmen & Assistants' Union of N. Am.*, 440 F.2d 1113 (6th Cir. 1971) (the decision predates *Irwin*, waiver of the deadline at issue was permitted, and the statute at issue, 29 U.S.C. § 482(b), does not contain "in no event").

92, 111 S. Ct. 453, and Social Security, *Bowen*, 476 U.S. at 469, 106 S. Ct. 2022. Similarly, section 3330a is less detailed than the highly complex scheme used to provide benefits to veterans. *See Bailey*, 160 F.3d 1360 (holding that 38 U.S.C. § 7266 is subject to equitable tolling). *But see Brice*, 240 F.3d at 1373 (holding that the National Childhood Vaccine Injury Act is "part of a detailed statutory scheme which includes other strict deadlines").

Second, section 3330a's fairly simple language is not technical, especially as compared to the tax statute at issue in *Brockamp* and the securities statute at issue in *Lampf*. Third, the timing provisions in section 3330a are not repeated. *See Brockamp*, 519 U.S. at 351, 117 S. Ct. 849 ("[Section] 6511 reiterates its limitations several times in several different ways."). Fourth, section 3330a does not contain explicit exceptions to the two filing deadlines. *See Bailey*, 160 F.3d at 1365 ("Likewise, section 7266 does not provide its own exceptions to the general rule."); *see also Brockamp*, 519 U.S. at 351, 117 S. Ct. 849 ("[Section] 6511 sets forth explicit exceptions to its basic time limits, and those very specific exceptions do not include 'equitable tolling.'"); *Martinez v. United States*, 333 F.3d 1295, 1318 (Fed. Cir. 2003) (en banc) (finding that 28 U.S.C. § 2501 contains an explicit exception for "persons 'under legal disability'"); *Brice*, 240 F.3d at 1373 ("[T]he Act includes a specific exception from the limitations period for a petition improperly filed in state or federal court."). Moreover, the 15-day filing period under section 3330a(d)(1)(B) is extraordinarily short, in sharp contrast to the three-year period of repose in *Lampf*, and the "unusually generous" 12-year period of repose in *Beggerly*, 524 U.S. at 48-49, 118 S. Ct. 1862.

Finally, section 3330a's purpose and the statutory scheme in which it operates make it abundantly clear that the *Irwin* presumption is not rebutted. The purpose of the VEOA is to assist veterans in obtaining gainful employment with the federal government and to provide a mechanism for enforcing this right. In a very real sense, it is an expression of gratitude by the federal government to the men and women who have risked their lives in defense of the United States. It defies logic to suppose that when Congress adopted the VEOA in 1998, well after the Supreme Court's decision in *Irwin*, it intended the narrow interpretation that the government gives it. *See Young*, 535 U.S. at 49-50, 122 S. Ct. 1036 ("Congress must be presumed to draft limitations periods in light of [the *Irwin* presumption]."") (citations omitted).

It is also relevant that veterans who seek to enforce their rights under the VEOA often proceed without the benefit of representation, just as Kirkendall did. Under such circumstances, it is "particularly inappropriate" to foreclose equitable relief. *Zipes*, 455 U.S. at 397, 102 S. Ct. 1127 (quoting *Love v. Pullman*, 404 U.S. 522, 527, 92 S. Ct. 616, 30 L. Ed. 2d 679 (1972)); *see also Bowen*, 476 U.S. at 480, 106 S. Ct. 2022 ("The statute of limitations we construe in this case is contained in a statute that Congress designed to be unusually protective of claimants.") (internal quotation marks omitted).

C.

The government raises one final objection to our holding. It argues that because section 3330a(d)(1)(B) sets forth a provision specifying the time for review, it is "mandatory and jurisdictional," and "not subject to equitable tolling." *See Stone v. INS*, 514 U.S. 386, 405,

115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995) (quoting *Missouri v. Jenkins,* 495 U.S. 33, 45, 110 S. Ct. 1651, 109 L. Ed. 2d 31 (1990)). This contention is without merit. In *Bailey v. West,* we also confronted a statute specifying the time for review, and sitting *en banc,* we found that 38 U.S.C. § 7266 is subject to equitable tolling. We held, "statutes specifying the time for review are within the rebuttable presumption in favor of equitable tolling." 160 F.3d at 1367. We further stated: "We recognize that language in *Stone* and *Missouri v. Jenkins* can be read to draw a bright line which would place statutes of limitation on one side of the *Irwin* presumption and statutes of timing of review on the other. We are not comfortable drawing that line, because the language of *Irwin* admits of no such distinctions. . . . *Missouri v. Jenkins* was decided only a few months before *Irwin.* If the Supreme Court had meant to shield statutes specifying the time for review from the *Irwin* presumption, we would have expected the distinction to be drawn in *Irwin." Id.*; *accord Socop-Gonzalez v. INS,* 272 F.3d 1176, 1192-93 (9th Cir. 2001) (en banc) ("Like the Federal Circuit, we do not believe that the Supreme Court meant to distinguish between statutes of limitations and statutes specifying the time for review when it established the generally applicable rule in *Irwin* that time limits involved in filing suit against the government are presumed to be subject to equitable tolling.").

In decisions post-dating *Bailey*, the Supreme Court has "clarified that time prescriptions, however emphatic, 'are not properly typed "jurisdictional."'" *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 126 S. Ct. 1235, 1242, 163 L. Ed. 2d 1097 (2006) (quoting *Scarborough v. Principi,* 541 U.S. 401, 414, 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004)). In *Eberhart v. United States,* 546 U.S. 12, 126

S. Ct. 403, 405, 163 L. Ed. 2d 14 (2005), the Court stated: "'Clarity would be facilitated,' we have said, 'if courts and litigants used the label "jurisdictional" not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.'" (Quoting *Kontrick v. Ryan,* 540 U.S. 443, 455, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004)). The Court acknowledged that its "repetition of the phrase 'mandatory and jurisdictional' ha[d] understandably led the lower courts to err on the side of caution by giving [certain time limitations] the force of subject-matter jurisdiction." *Eberhart,* 126 S. Ct. at 407. These decisions establish that timing provisions like those of section 3330a are not necessarily "mandatory" or "jurisdictional," and they bolster *Bailey's* holding that *Stone* and *Missouri v. Jenkins* cannot be read to create a per se rule placing "statutes of limitation on one side of the *Irwin* presumption and statutes of timing of review on the other." *Bailey,* 160 F.3d at 1367.

The fact that some provisions specifying the time for review are not subject to equitable tolling is irrelevant to our analysis as to whether it is available under *this* statute, section 3330a(d)(1)(B). Rather, such holdings are in accord with *Irwin's* command that equitable tolling shall not apply where Congress has so provided. 498 U.S. at 96, 111 S. Ct. 453; *see, e.g., Stone,* 514 U.S. 386, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (holding that based on the statutory text and structure and the nature of congressional amendments to the statutory scheme, motions for reconsideration of a decision by the Board of Immigration Appeals do not toll the 90-day period to appeal a final deportation order); *Missouri v. Jenkins,* 495 U.S. 33, 110 S. Ct. 1651, 109 L. Ed. 2d 31 (holding

that where the statute at issue provided for an additional 60 days to file for good cause shown and Congress had demonstrated an intent to preclude tolling, the 90-day period to file a petition for certiorari to the Supreme Court was not subject to equitable tolling); *Oja v. Dep't of the Army*, 405 F.3d 1349 (Fed. Cir. 2005).[7]

When we consider that the timing provision at issue here is analogous to those found subject to equitable tolling in *Irwin*, 498 U.S. at 94, 111 S. Ct. 453 (30-day window in which to seek review in district court of a final action by the EEOC),[8] and *Bowen*, 476 U.S. at 472, 106 S. Ct. 2022 (60-day window in which to seek "review" of a denial of social security benefits by the Secretary of Health and Human Services),[9] our holding is unremark-

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[7] The *dicta* in *Farzana K. v. Indiana Department of Education*, 473 F.3d 703 (7th Cir. 2007), discussed, *post*, separate opinion of Dyk, J., is not authority for anything, much less, for when equitable relaxation of a *federal veterans* deadline specifying the timing for review is appropriate. *Farzana* held that the party there did meet a *state's* deadline to seek judicial review of a determination, thus making any discussion of equitable relief superfluous.

[8] 42 U.S.C. § 2000e-16(c) (1988) provides in pertinent part:

> Within thirty days of receipt of notice of final action taken by . . . the Equal Employment Opportunity Commission . . . an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title.

[9] 42 U.S.C. § 405(g) (1982) provides in pertinent part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a *review* of such decision by a civil action commenced within sixty days after the mailing to him of

able and entirely consistent with Supreme Court precedent. This is especially so in view of *Irwin*'s pronouncement that it "adopt[ed] a more general rule to govern the applicability of equitable tolling in suits against the Government," and that "[t]he phraseology of th[e] particular statutory time limit [in 42 U.S.C. § 2000e-16] is probably very similar to some other statutory limitations on suits against the Government." *Id.* at 94-95, 111 S. Ct. 453.

D.

Even if this were a close case, which it is not, the canon that veterans' benefits statutes should be construed in the veteran's favor would compel us to find that section 3330a is subject to equitable tolling. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9, 112 S. Ct. 570, 116 L. Ed. 2d 578 (1991) ("Even if the express examples [from other subsections of the statute at issue] unsettled the significance of subsection (d)'s drafting, however, we would ultimately read the provision in King's favor under the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor."); *Ala. Power Co. v. Davis*, 431 U.S. 581, 584, 97 S. Ct. 2002, 52 L. Ed. 2d 595 (1977) ("This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need.") (quoting *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285, 66 S. Ct. 1105, 90 L. Ed. 1230 (1946)). Both subsection

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notice of such decision or within such further time as the Secretary may allow.

(emphasis added).

3330a(a)(1)(A) and subsection 3330a(d)(1)(B) are subject to equitable tolling.

II. *Hearing Rights Under USERRA*

With respect to hearing rights, our analysis begins with the USERRA statute itself. *See Sheehan v. Dep't of the Navy,* 240 F.3d 1009, 1012 (Fed. Cir. 2001) (deciding the burden of proof requirement for USERRA actions "[o]n the basis of the statute and the appurtenant legislative history"). 38 U.S.C. § 4324(c)(1) provides: "The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b). . . . A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board." The unambiguous meaning of the language is that any veteran who requests a hearing shall receive one. Indeed, section 4324(c)(1) begins, the board "shall adjudicate any complaint brought before [it]." The discretion it then affords does not relate to whether a hearing may be denied, but to how the veteran "may be represented" at the "hearing or adjudication." By providing that the board *shall* adjudicate all USERRA claims brought before it and affording discretion over how the veteran may be represented at any requested "hearing or adjudication," the statute clearly evinces Congress' intent to provide veterans with a hearing as a matter of right. To interpret the statute otherwise would render the "such hearing" language nonsensical. The board has discretion neither to deny a requested "adjudication," nor to deny a requested "hearing."

Until now, it has been the board's practice to grant a hearing as a matter of administrative grace, or deny

one at its convenience. *See, e.g., Matotek v. Dep't of Commerce*, 104 M.S.P.R. 36, 41 (2006); *Jordan v. U.S. Postal Serv.*, 90 M.S.P.R. 525, 529 (2002), *aff'd*, 82 Fed. Appx. 42 (Fed. Cir. 2003). But it must administer the law as Congress wrote it. The board's consistent misapplication of the law can neither be used to defend its practice; nor to justify what Congress did not intend. *See Brown v. Gardner*, 513 U.S. 115, 120-21, 115 S. Ct. 552, 130 L. Ed. 2d 462 (1994) (where the Department of Veterans Affairs' 60-year regulatory practice was contrary to statute, congressional reenactment of the statute and legislative silence did not constitute an implicit endorsement); *see also Demarest v. Manspeaker*, 498 U.S. 184, 190, 111 S. Ct. 599, 112 L. Ed. 2d 608 (1991) ("Where the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction."); *Mass. Trs. of E. Gas & Fuel Assocs. v. United States*, 377 U.S. 235, 241-242, 84 S. Ct. 1236, 12 L. Ed. 2d 268 (1964) (congressional reenactment has no interpretive effect where regulations clearly contradict requirements of statute). To be sure, the board is free to set out regulations for the orderly conduct of business, but it cannot use that discretion to override the congressionally mandated right to a hearing.

5 U.S.C. § 7701(a) lends additional support to our reading of section 4324(c). It provides: "An employee, or applicant for employment, may submit an *appeal* to the Merit Systems Protection Board from *any action which is appealable* to the Board under any law, rule, or regulation. An appellant shall have the right—(1) to a hearing for which a transcript will be kept; and (2) to be represented by an attorney or other representative." Plainly, Kirkendall's USERRA claim is "appealable" to the board under section 4324, and therefore consti-

tutes an "appeal" entitled to a hearing. *Cf.* 5 C.F.R. § 1208.4(c) ("'USERRA appeal' means an appeal filed under 38 U.S.C. § 4324."); 5 C.F.R. § 1208.13 (characterizing board review of USERRA claims as "USERRA appeals"); *see also Kirkendall v. Dep't of the Army*, AT-3443-02-0622-I-1, AT-0330-02-0621-B-1 (MSPB Dec. 4, 2003) (referring to board review of Kirkendall's USERRA claim as an "appeal").

It is true, as the government argues, that Kirkendall's proceeding before the board is not an appeal in the traditional Article III sense, as defined by *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803), but this is of no moment. In providing procedural protections for employees of and applicants to the federal government, *e.g.*, 5 U.S.C. § 7512, Congress made clear its intent to vary the *Marbury* definition of "appeal" in federal employment contexts. Indeed, the vast majority of cases heard by the board, and subject to section 7701 procedures, are "appeals" of employment decisions, disciplinary or otherwise, made in the first instance by an agency. *See, e.g., Price v. Soc. Sec. Admin.*, 398 F.3d 1322 (Fed. Cir. 2005); *Guillebeau v. Dep't of the Navy*, 362 F.3d 1329 (Fed. Cir. 2004); *Knight v. Dep't of Def.*, 332 F.3d 1362 (Fed. Cir. 2003). These cases do not involve a lower tribunal, such as a district court, yet they clearly involve an initial decision maker distinct from the board, rendering them an "appeal" of agency action. In the same way, USERRA claims derive from an agency's employment decision, e.g., the refusal to hire a veteran.

Merely because Congress described Kirkendall's petition for review as a "complaint" does not suggest that it intended to characterize his action as an "origi-

nal" proceeding before the board, and deprive him of the right to a hearing. To the contrary, in determining what procedural protections Congress intended to afford USERRA complainants, we look to the substance of the matter, review of an initial agency action, not to the form surrounding it or the name ascribed, initiation of proceedings before the board with a "complaint." *Cf. Dolan v. City of Tigard*, 512 U.S. 374, 405 n.8, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) ("In determining what is due process of law regard must be had to substance, not to form.") (quoting *Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 235, 17 S. Ct. 581, 41 L. Ed. 979 (1897)); *see also Katz v. Cisneros*, 16 F.3d 1204, 1207 (Fed. Cir. 1994) ("[W]e look to the true nature of the action in determining the existence or not of jurisdiction."); *Chem. Eng'g Corp. v. Marlo, Inc.*, 754 F.2d 331, 333 (Fed. Cir. 1984) ("Implicit in our mandate is the authority to recharacterize pleadings which would improperly evade the intent of Congress."); *In re Snap-on Tools Corp.*, 720 F.2d 654, 655 (Fed. Cir. 1983) ("The issue here turns on the nature of the action as established in the complaint."). Moreover, it is incongruous to presume that Congress intended to provide hearings as a matter of right in cases involving discipline for misconduct, *e.g.*, *Price*, 398 F.3d at 1322 (constructive suspension); *Guillebeau*, 362 F.3d at 1329 (Fed. Cir. 2004) (removal), while declining to so provide for veterans who may have been victimized.

There is no ambiguity here. "Ambiguity is a creature not of definitional possibilities but of statutory context." *Brown*, 513 U.S. at 118, 115 S. Ct. 552; *see also St. Vincent's Hosp.*, 502 U.S. at 221, 112 S. Ct. 570 ("[T]he meaning of statutory language, plain or not, depends on context."). But even if section 4324, especially in the

context of section 7701(a), still fairly permitted of more than one interpretation, the rule set out in *St. Vincent's Hospital,* 502 U.S. at 220 n.9, 112 S. Ct. 570; *Alabama Power Co.,* 431 U.S. at 584, 97 S. Ct. 2002; and *Fishgold,* 328 U.S. at 285, 66 S. Ct. 1105, would demand that we find in Kirkendall's favor. *St. Vincent's Hospital,* and *Brown,* 513 U.S. at 117-18, 115 S. Ct. 552, make clear that "interpretive doubt is to be resolved in the veteran's favor" and operate to rebut or eliminate otherwise fair readings in close cases. And this statutory regime emphatically does not admit of deference to the board à la *Chevron* because "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843 n.9, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). After applying the interpretive rule in *Fishgold,* it is abundantly clear that Congress' intent is to provide veterans a hearing upon request, especially because we "presume congressional understanding of such interpretive principles," at the time of enactment. *St. Vincent's Hospital,* 502 U.S. at 220 n.9, 112 S. Ct. 570.

Contrary to the government's assertion, *Lindahl v. Office of Personnel Management,* 776 F.2d 276 (Fed. Cir. 1985), does not conflict with our holding here; in fact, it enhances it. *Lindahl* provides that, absent a reference to 5 U.S.C. § 7701 in the statute giving rise to the right of action, there 5 U.S.C. § 8347(d)(1), some of its guidelines, whether procedural or substantive, may apply to an action without invoking all of them, as contrasted with cases under 5 U.S.C. § 8347(d)(2), which explicitly refers to section 7701. *Id.* at 278-80. Indeed, *Lindahl* approved of the board's practice of applying

most of section 7701's procedures to voluntary physical disability retirement cases, but not applying its burden of proof. *Id.* Similarly, section 4324(c)(1) in this case gives rise to the right to a hearing, while 38 U.S.C. § 4311(c)(1) and the legislative history surrounding USERRA make clear that section 7701(c)'s burden of proof requirement does not apply. *See Sheehan,* 240 F.3d at 1012-14.

In fact, had Congress referenced section 7701 in the USERRA statute, section 7701(c)'s burden of proof, along with all of section 7701's remaining procedures, would necessarily apply. Therefore, its decision not to reference this "catch-all" statute does not in any way suggest an intent not to provide a right to a hearing. It only demonstrates that Congress, while providing for a hearing, did not necessarily want all of section 7701 to apply. Consequently, because Kirkendall requested a hearing before the board on his USERRA claim, we reverse the board's decision to deny him one.

Conclusion

Accordingly, the decision of the Merits Systems Protection Board is reversed, and the case is remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

GAJARSA, Circuit Judge, concurring, with whom Circuit Judge NEWMAN and Senior Circuit Judge PLAGER join.

I join Part I of the majority, which holds that the 15-day window for filing an appeal to the Merit Systems Protection Board ("Board") under 5 U.S.C. § 3330a is subject to equitable tolling. I also join Part II of the majority, which holds that the veteran is entitled to a

hearing before the Board on his USERRA claim. I write separately, however, to provide an additional basis to support the judgment reached in Part I.

I.

I too begin with *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990), the seminal Supreme Court precedent on the applicability of the equitable tolling doctrine in suits against the government. In *Irwin*, the Court adopted "a more general rule to govern the applicability of equitable tolling in suits against the Government" and held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96, 111 S. Ct. 453. While acknowledging that a "waiver of sovereign immunity cannot be implied but must be unequivocally expressed," *id.* (citation omitted), the Court reasoned:

> Once Congress has made such a waiver, we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver. Such a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation.

Id. The Court thus applied the equitable tolling doctrine to 42 U.S.C. § 2000e-16(c), which specifies the time in days that a Title VII complaint against the government must be filed in district court after final action by the EEOC. *Id.* at 91, 96, 111 S. Ct. 453.

Accordingly, the Supreme Court has directed courts to engage in a two-step inquiry of asking (1) whether there is a private suit that is "sufficiently similar to warrant asking (2) *Irwin's* negatively phrased question: Is there good reason to believe that Congress did *not* want the equitable tolling doctrine to apply?" *United States v. Brockamp,* 519 U.S. 347, 350, 117 S. Ct. 849, 136 L. Ed. 2d 818 (1997). Similarly, the rule our court has drawn "from *Irwin* is that the doctrine of equitable tolling, [1] when available in comparable suits of private parties, is available in suits against the United States, [2] unless Congress has expressed its intent to the contrary." *Bailey v. West,* 160 F.3d 1360, 1364 (Fed. Cir. 1998) (en banc).

In this case, as noted in the majority opinion, Kirkendall's suit is analogous to a Title VII discrimination claim. The first inquiry of *Irwin* asks only if the suit against the government is similar, not identical, to a private suit. The statute at issue in this case establishes an administrative procedure for redress for a preference eligible veteran "who alleges that an agency has violated such individual's rights . . . relating to veterans' preference." 5 U.S.C. § 3330a(a)(1)(A). Under the statute, the veteran has 60 days after the date of the alleged violation to file a complaint with the Department of Labor ("DoL"). If the DoL is unable to resolve the complaint within another 60 days, the veteran may "appeal the alleged violation to the Merit Systems Protection Board in accordance with such procedures as the Merit Systems Protection Board shall prescribe, except that in no event may any such appeal be brought . . . later than 15 days after the date on which the complainant receives written notification from" the DoL. *Id.* § 3330a(d). Similarly, in a Title VII action between private parties, a plaintiff has

180 days from the occurrence of the alleged unlawful employment practice to file a complaint with the EEOC. 42 U.S.C. § 2000e-5(e). If the EEOC dismisses the complaint, the plaintiff has 90 days from the time of EEOC notification to file a civil action in a district court. *See* id. § 2000e-5(f)(1). Therefore, I agree that Kirkendall's suit is sufficiently similar to proceed to the next *Irwin* inquiry.

II.

A.

The second inquiry of *Irwin* comes from the Supreme Court's acknowledgment that "Congress, of course, may provide otherwise if it wishes to do so." 498 U.S. at 96, 111 S. Ct. 453. The Court has thus asked: "Is there good reason to believe that Congress did *not* want the equitable tolling doctrine to apply?" *Brockamp,* 519 U.S. at 350, 117 S. Ct. 849; *see also Bailey,* 160 F.3d at 1364 (asking if "Congress has expressed its intent to the contrary").

The Court found such a reason in *Brockamp.* The statute at issue in *Brockamp* stated that a claim "shall be filed" within a period of years, but the Court did not simply hold that those three words evidenced Congressional intent. Rather, the Court examined the entire language in context and found the tax statute to set forth "its limitations in unusually emphatic form" because the statute (1) sets "forth its limitations in a highly detailed technical manner, that, linguistically speaking, cannot easily be read as containing implicit exceptions"; (2) "reiterates its limitations several times in several different ways"; (3) specifies procedures for "refunds that do not comply with these limitations" and "explicit exceptions to its basic time limits, and those very specific exceptions do not

include 'equitable tolling.'" *Id.* at 350-52, 117 S. Ct. 849. The Court also examined the substance of the statute and found that equitable tolling the tax statute (4) "would require tolling, not only procedural limitations, but also substantive limitations on the amount of recovery—a kind of tolling for which we have found no direct precedent"; and (5) "could create serious administrative problems by forcing the IRS to respond to, and perhaps litigate, large numbers of late claims, accompanied by requests for 'equitable tolling' which, upon close inspection, might turn out to lack sufficient equitable justification." *Id.* at 352-53, 117 S. Ct. 849 (observing that tax law "is not normally characterized by case-specific exceptions reflecting individualized equities").

In this case, it is undisputed that the second, third, fourth, and fifth factors evidence no intent of Congress to preclude equitable tolling. Indeed, the government concedes that VEOA does not reiterate its limitations, contains no explicit exceptions, and would create no serious administrative problem for the Board. As we stated en banc in *Bailey,* "because the statute addresses timeliness for an appeal from a closed record, it does not threaten administrative complexity or unpredictable fiscal peril." 160 F.3d at 1365 (applying *Brockamp* in holding that equitable tolling applies to 120-day time limit for appeal in Court of Veterans Appeals). The government does not even mention that tolling VEOA would affect no substantive limitations. Similarly, Judge Moore's dissent acknowledges that the second and third factors favor tolling in this case, *post,* at 860-61, and makes no mention of the fourth and fifth *Brockamp* factors.

Therefore, the only *Brockamp* factor in dispute is the first, where the Supreme Court found that the tax stat-

ute sets "forth its limitations in a highly detailed technical manner, that, linguistically speaking, cannot easily be read as containing implicit exceptions." 519 U.S. at 350, 117 S. Ct. 849. As examples, the Court found the following:

> [The *Brockamp* tax statute] says, first, that a
>
> > "[c]laim for . . . refund . . . of any tax . . . shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed . . . within 2 years from the time the tax was paid." 26 U.S.C. § 6511(a). . . .
>
> And
>
> > "[i]f the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim." § 6511(b)(2)(B).

Id. at 351, 117 S. Ct. 849. In this case, the VEOA statute states simply that "in no event may any such appeal be brought . . . later than 15 days after the date on which the complainant receives written notification from the Secretary under subsection (c)(2)." In comparison with the *Brockamp* tax statute, the VEOA statute does not set forth its 15-day limitation in a "highly detailed technical manner."

The government concedes that the VEOA statute is not technical, but asserts that it is detailed because it is sequential. *See* Resp't Br. 25-27. Judge Moore's dissent goes one step further and asserts that the sequential

nature of the VEOA statute makes it both "detailed and technical." *Post,* at 858. As discussed in *infra* Part II.C, the sequential nature of the VEOA statute fails to satisfy the two-tiered structure of *Lampf.* Therefore, Judge Moore's dissent and the government both attempt to shoehorn the sequential nature of VEOA into *Brockamp's* "highly detailed technical" description of the tax statute excerpted above. This non sequitur, however, is unjustified and contrary to the entire language of the VEOA statute.

Accordingly, *Brockamp* offers no "good reason to believe that Congress did *not* want the equitable tolling doctrine to apply" in this case. 519 U.S. at 350, 117 S. Ct. 849.

B.

The Supreme Court also found good reason that equitable tolling should not apply in *Beggerly,* 524 U.S. 38, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998). The Quiet Title Act ("QTA") was the statute at issue in *Beggerly* and stated that QTA actions "*shall be barred* unless it is commenced within twelve years." 28 U.S.C. § 2409a(g) (emphasis added).

While stating that "[e]quitable tolling is not permissible where it is inconsistent with the text of the relevant statute," *Beggerly,* 524 U.S. at 48, 118 S. Ct. 1862, the Court did not hold that the three words, "shall be barred," precluded equitable tolling. Indeed, *Beggerly* did not even recite the three words as relevant. Instead, as it did in *Brockamp,* the Court examined the entire language of the statute in context and found that

> the QTA, by providing that the statute of limitations will not begin to run until the plaintiff "knew or

> should have known of the claim of the United States," has already effectively allowed for equitable tolling. Given this fact, and the unusually generous nature of QTA's limitations time period, extension of the statutory period by additional equitable tolling would be unwarranted.

Beggerly, 524 U.S. at 48-49, 118 S. Ct. 1862 (citation omitted). The Court similarly examined the substance of the statute and found that "[t]his is particularly true given that the QTA deals with ownership of land." *Id.* at 49, 118 S. Ct. 1862.

> It is of special importance that landowners know with certainty what their rights are, and the period during which those rights may be subject to challenge. Equitable tolling of the already generous statute of limitations incorporated in the QTA would throw a cloud of uncertainty over these rights, and we hold that it is incompatible with the Act.

Id.

In this case, there is no text within VEOA that "effectively" allows for equitable tolling based on the date that time begins to accrue. Next, the 15-day time limit at issue here is far from the "unusually generous" 12-year period in *Beggerly*. Lastly, the government has asserted no "special importance" with the 15-day period under 5 U.S.C. § 3330a(d)(1), and under such circumstances, foreclosing equitable tolling would be "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Zipes v. TWA, Inc.*, 455 U.S. 385, 397, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982) (holding that Title VII filing period is requirement subject to tolling when equity so requires) (citation omitted); *see also* Majority, *ante*, at 842.

Judge Moore's dissent attempts to elevate the importance of precluding tolling in the VEOA statute by observing its impact on the public fisc. *Post,* at 858-59. This argument is unavailing. By definition, the *Irwin* presumption of equitable tolling applies to statutes that provide for suits against the government and thus, always implicates the public fisc. Therefore, the VEOA statute does not rise to the "special importance" of the QTA in *Beggerly,* where the Supreme Court found that landowners must "know with certainty what their rights are, and the period during which those rights may be subject to challenge." 524 U.S. at 49, 118 S. Ct. 1862.

Accordingly, as with *Brockamp,* 519 U.S. at 350, 117 S. Ct. 849, there is no "good reason to believe that Congress did *not* want the equitable tolling doctrine to apply" based on *Beggerly.*

C.

In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350, 111 S. Ct. 2773, 115 L. Ed. 2d 321 (1991), the Supreme Court evaluated a statute that contained the words "in no event" and held that equitable tolling should not apply. *Id.* at 360 n.7, 363, 111 S. Ct. 2773. The Court, however, did not even recite the words "in no event" in reaching its holding regarding equitable tolling. Rather, the Court examined the language of the statute in context. The Securities and Exchange Act statute at issue stated:

> No action shall be maintained to enforce any liability . . . unless brought within one year after the discovery of the untrue statement or the omission. . . . *In no event* shall any such action be brought to enforce

> a liability . . . more than three years after the security was bona fide offered to the public.

Id. at 360 n.7, 111 S. Ct. 2773 (quoting 15 U.S.C. § 77m) (emphasis added). Based on the structure established by the statute in context, the Court concluded that:

> The 1-year period, by its terms, begins after discovery of the facts constituting the violation, making tolling unnecessary. The 3-year limit is a *period of repose* inconsistent with tolling. . . . Because the purpose of the 3-year limitation is clearly to serve as a cutoff, we hold that tolling principles do not apply to that period.

Id. at 363, 111 S. Ct. 2773 (emphasis added).

In this case, VEOA establishes procedures where a veteran has 60 days to file a complaint and the DoL has another 60 days to resolve the complaint. If the DoL is unable to resolve the complaint within the 60 days after the date on which it is filed, the DoL must notify the veteran, who then has 15 days to file with the Board. These procedures establish no structure indicating that the 15-day period is a period of repose. Therefore, *Lampf* does not support a finding precluding equitable tolling.

Nonetheless, Judge Moore's dissent and the government assert that VEOA "is like the two-tiered structure employed in section 13 of the 1933 Securities Exchange Act discussed in *Lampf.*" *Post,* at 858; Resp't Br. 25-26. By listing multiple sequential time periods, it is true that VEOA establishes a structure. *Lampf,* however, does not stand for the proposition that any statute with any structure is inconsistent with equitable tolling. Rather, the critical inquiry under *Lampf* is whether the structure reveals that one limitation is a period of repose. In

Lampf, the 3-year limitation served as a cutoff for the 1-year period, which "has already effectively allowed for equitable tolling" by providing that accrual "begins after discovery of the facts." *Beggerly,* 524 U.S. at 48, 118 S. Ct. 1862 (citation omitted); *Lampf,* 501 U.S. at 363, 111 S. Ct. 2773. The 3-year time period thus constituted a period of repose inconsistent with equitable tolling. In this case, the 15-day time limitation for filing with the Board does not serve as a cutoff for the 60-day period for filing a complaint. Therefore, the 15-day period at issue is not a period of repose, and *Lampf* offers no support for Judge Moore's dissent or the government's position.

By asserting that the structure of VEOA is like "the two-tiered structure" of the *Lampf* statute, Judge Moore's dissent and the government have essentially stated that if a statute contains more than one time period, there is "good reason to believe that Congress did *not* want the equitable tolling doctrine to apply." *Brockamp,* 519 U.S. at 350, 117 S. Ct. 849. Under that rationale, all suits against the government that must be exhausted in an administrative agency before a plaintiff may file in a district court or in the Court of Federal Claims would establish a structure inconsistent with equitable tolling. Such erroneous reasoning would eviscerate the *Irwin* presumption established by the Supreme Court. Indeed, because a plaintiff must first exhaust a Title VII claim in the EEOC before filing an action in a district court, the rule argued by Judge Moore's dissent and the government in this case would presumably seek to overturn *Irwin* itself.

The critical question of *Lampf* is whether the "structure" establishes a period of repose. In this case, the answer is no, and accordingly, there is no "good reason

to believe that Congress did not want the equitable tolling doctrine to apply" under *Lampf*. *Brockamp*, 519 U.S. at 350, 117 S. Ct. 849.

III.

The overriding message of the Supreme Court's precedents of *Brockamp*, *Beggerly*, and *Lampf* is that we should examine the language in context and the substance of the statute in determining whether equitable tolling should not apply in a suit against the government. As shown, when applying the Supreme Court's precedents properly, the government and the dissenting opinions have failed to show that equitable tolling is inconsistent with the text of VEOA. Therefore, there is no "good reason to believe that Congress did *not* want the equitable tolling doctrine to apply." *Brockamp*, 519 U.S. at 350, 117 S. Ct. 849.

The government and the dissenting opinions, however, attempt to create new exceptions to scale back the presumption of tolling that the Supreme Court established in *Irwin*. These new exceptions are based on misinterpreting Supreme Court precedent and disregarding this court's precedent.

A.

First, Judge Moore's dissent attempts to establish a new rule holding that three words alone, "in no event," preclude equitable tolling. To do so, her dissent seizes on one sentence in *Brockamp*, 519 U.S. at 350, 117 S. Ct. 849 (emphasis added), stating that the tax statute "sets forth its time limitations in unusually emphatic form," and labels it a *Brockamp* factor. *Post*, at 854-57. Her dissent then discards the five *Brockamp* factors actually

enunciated and makes its newly created "unusually emphatic" factor dispositive.

This misreads and misrepresents *Brockamp*. While the *Brockamp* sentence taken out of context could be read as an independent factor, reading the Supreme Court's entire discussion reveals that it states a conclusion based on the five factors discussed above in *supra* Part II.A. *See* 519 U.S. at 350-54, 117 S. Ct. 849. The Court did not, as Judge Moore's dissent does, identify certain words as being "unusually emphatic" in form. Rather, the Court evaluated, as I do here, the five enunciated *Brockamp* factors. It is clear to me that the phrase "unusually emphatic" in *Brockamp* is not an independent factor but a conclusion based upon the enunciated factors, and there is no controlling precedent to the contrary.

Judge Moore's dissent also concludes summarily that "[s]hort of saying 'equitable tolling shall not apply,' we do not think Congress could have been clearer." *Post*, at 855. Congress, however, enacted the VEOA statute after the Supreme Court decided *Irwin*. Therefore, Congress could have placed the words "equitable tolling shall not apply" in the statute but did not do so. Her dissent offers no rationale for why we should not require the words "equitable tolling shall not apply" when precluding equitable tolling based on a few words selectively removed from the entire language and substance of a statute. As the Supreme Court stated regarding the *Irwin* presumption, "Congress must be presumed to draft limitations periods in light of this background principle." *Young v. United States*, 535 U.S. 43, 49-50, 122 S. Ct. 1036, 152 L. Ed. 2d 79 (2002) (citations omitted). Moreover, the footnote assertion of her dissent that no statute contains

such words is no justification for us to define an incantation of other "magic words" to preclude equitable tolling. *Post,* at 855.

Even if it were prudent to identify certain words as precluding equitable tolling, Judge Moore's dissent offers no rationale for why the words "in no event" are so "unusually emphatic." Time limitations in statutes often include words such as "shall," "must," or "barred." It is wholly unclear from her dissenting opinion and the government's brief what would make one of these terms merely "ordinary and simple," another "emphatic," another "usually emphatic," and another "*unusually* emphatic." Similarly, while I agree with the proposition that "equitable tolling is not permissible where it is inconsistent with the text of the relevant statute," *Beggerly,* 524 U.S. at 48, 118 S. Ct. 1862, Judge Moore's dissent offers no reasoned justification to explain why tolling is consistent with a statute that uses, for example, the term "must" but is inconsistent with a statute that uses the term "in no event."

The cases cited by Judge Moore's dissent from other circuits to the contrary are neither controlling nor applicable. *See Dubuc v. Johnson,* 314 F.3d 1205, 1209 (10th Cir. 2003) (interpreting not periods of limitation, but prerequisites of proceeding in forma pauperis); *Webb v. United States,* 66 F.3d 691, 700-02 (4th Cir. 1995) (interpreting statute of repose from two-tiered *Lampf* structure); *Aldrich v. McCulloch Props., Inc.,* 627 F.2d 1036, 1043 (10th Cir. 1980) (same); *Caviness v. DeRand Res. Corp.,* 983 F.2d 1295, 1301 (4th Cir. 1993) (same); *Hodgson v. Int'l Printing Pressmen & Assistants' Union of N. Am.,* 440 F.2d 1113, 1116-17 (6th Cir. 1971) (proposing that "[i]t may, however, be significant that the more em-

phatic language 'but in no event after 60 days' was not adopted," but placing no weight on such legislative history in ultimate holding).

Therefore, there is no reasoned justification to create a new exception to the *Irwin* presumption to preclude the application of equitable tolling based on the use of the three words "in no event."

B.

Second, Judge Moore's dissent attempts to establish a new rule holding that time limits "for filing an appeal rather than an initial cause of action" constitute a factor weighing "against a finding that equitable tolling applies." *Post*, at 860-61. As discussed by the majority opinion, *ante*, at 842-43, this court decided en banc in *Bailey* that the same *Irwin* presumption applies to statutes of limitations and statutes of timing of review. *See* 160 F.3d at 1366-68. Judge Moore's argument in this case that the nature of the deadline is nonetheless relevant merely recasts the argument that this court dismissed in *Bailey*. Specifically, by considering the appellate nature of a deadline to be a factor against equitable tolling, her dissent attempts to bifurcate the equitable tolling doctrine into two branches: (1) for time limits of initial causes of action, the *Irwin* presumption applies, and (2) for time limits of filing appeals, a lighter presumption or no presumption applies.

Of course, this court sitting en banc may reconsider our own precedent. Judge Moore's dissent, however, has not even acknowledged that its argument seeks to overturn our en banc decision. Moreover, Judge Dyk's dissent, by explicitly seeking to overturn *Bailey* and failing, highlights the fact that *Bailey* remains controlling law. Therefore, *Bailey* compels us not to create a new excep-

tion applying a lighter or no presumption to time limits dealing with periods of review.

IV.

Accordingly, the Supreme Court's decisions in Irwin, *Brockamp*, *Beggerly*, and *Lampf*, and our decision in *Bailey* dictate that the doctrine of equitable tolling applies to the VEOA statute and that Kirkendall has at least the opportunity to equitably toll the time limit.

MOORE, Circuit Judge, concurring in part and dissenting in part, in which PROST, Circuit Judge joins, and LOURIE, RADER, BRYSON, and DYK, Circuit Judges, join as to Part I.

I disagree with the majority's conclusion that section 3330a(d)(1) of Title 5 is subject to equitable tolling. Therefore, I dissent from Part I of the majority opinion. Additionally, while I agree with the majority that Kirkendall is entitled to a hearing on his Uniformed Services Employment and Reemployment Rights Act ("USERRA") claim, section 4324(c)(1) cannot be read to confer that right. Rather, I believe that Kirkendall has that right because the Merit Systems Protection Board ("Board"), through its regulations, has defined Kirkendall's USERRA claim as an "appeal" for which a hearing is granted under 5 U.S.C. § 7701. Therefore, I concur in the result with respect to Part II of the majority's opinion.

I. *Equitable Tolling*

The Veterans Employment Opportunities Act of 1998 ("VEOA") is an employment statute designed to provide certain preference-eligible veterans with a method for seeking redress if veteran's preference rights have been violated in hiring decisions made by the federal govern-

ment. *See* H.R. Rep. No. 105-40(I) (1997), 1997 WL 136375, at *9. By statute, VEOA claimants must first file a complaint with the Department of Labor ("DoL") within 60 days of the alleged veterans preference violation, 5 U.S.C. § 3330a(2)(A), and if the Secretary of Labor is unable to resolve the complaint, the claimant may appeal to the Board within 15 days of receiving notice that the DoL was unable to resolve the complaint. *See* 5 U.S.C. § 3330a(d)(1)(B) (2000). The majority holds that both of these deadlines may be equitably tolled.[1]

While I agree that under our precedent, there is a presumption that equitable tolling applies to Kirkendall's VEOA appeal under section 3330a(d)(1)(B), in my opinion, Congress rebutted that presumption when enacting the 15-day deadline for appealing to the Board. *See Bailey v. West*, 160 F.3d 1360, 1364-65 (Fed. Cir. 1998) (en banc) (concluding that the *Irwin* presumption applies to the deadline for filing an appeal under 38 U.S.C. § 7266(a)); *see also Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990). The presumption that equitable tolling applies may be rebutted if "there [is] a good reason to believe that Congress did *not* want the equitable tolling doctrine to apply." *United States v. Brockamp*, 519 U.S. 347, 350, 117 S. Ct. 849, 136 L. Ed. 2d 818 (1997). In *Bailey v. West*, we stated that "*Irwin* commands that tolling should be presumed absent a clear contrary intent of Congress to limit jurisdiction created by a particular statute." 160 F.3d at 1368.

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[1] Because I conclude that the 15-day deadline is not subject to equitable tolling, I need not reach the question of whether the 60-day deadline may be equitably tolled.

Factors that help us discern Congress's intent include whether the limitations are provided in unusually emphatic form, whether the limitations are set forth in a highly detailed technical manner, the statute's underlying subject matter, whether the limitations are reiterated in several different ways, and whether the statute sets forth explicit exceptions. *Brockamp,* 519 U.S. at 350-52, 117 S. Ct. 849. All *Brockamp* factors need not be present to find that Congress intended to preclude tolling. *See Brice v. Sec'y of Health & Human Servs.,* 240 F.3d 1367, 1372-73 (Fed. Cir. 2001). When analyzing a statute in view of the *Brockamp* factors, courts must remember that "equitable tolling is not permissible where it is inconsistent with the text of the relevant statute." *United States v. Beggerly,* 524 U.S. 38, 48, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998); *see also Young v. United States,* 535 U.S. 43, 49, 122 S. Ct. 1036, 152 L. Ed. 2d 79 (2002) (noting that it is "hornbook law" that limitations periods are tollable "unless tolling would be 'inconsistent with the text of the relevant statute'").

The majority only considers the *Brockamp* factors in its analysis and turns a blind eye toward other considerations which have traditionally been used to determine Congress's intent in statutory construction. In determining whether there is "good reason to believe that Congress did *not* want the equitable tolling doctrine to apply," *Brockamp,* 519 U.S. at 350, 117 S. Ct. 849, courts should look at all the evidence of congressional intent including all appropriate canons and tools of statutory construction, the plain words of the statute, and the nature of the proceeding provided for in the statute.

Based on the *Brockamp* factors, the majority concludes that Congress has not expressed a "clear contrary

intent," *Bailey,* 160 F.3d at 1368, to preclude equitable tolling and therefore the time period in section 3330a(d)(1)(B) can be equitably tolled. I disagree. Numerous factors suggest that Congress did not intend that the 15-day time period for filing an appeal be equitably tolled. These factors include: the emphatic "in no event" language—particularly when compared to the less emphatic language used to specify deadlines elsewhere in the VEOA, the highly detailed and technical structure of the administrative redress scheme embodied in the VEOA and the centrality of the 15-day deadline in that process, that the VEOA is a federal employment statute inherently requiring speedy resolution of grievances, and the fact that the deadline is a mandatory and jurisdictional appellate deadline.

A.

I believe that Congress set forth the 15-day deadline in unusually emphatic form. *Brockamp,* 519 U.S. at 350-52, 117 S. Ct. 849. Specifically, the "in no event" language is unequivocal and emphatic. The statute provides:

> If the Secretary of Labor is unable to resolve a complaint under subsection (a) within 60 days after the date on which it is filed, the complainant may elect to appeal the alleged violation to the Merit Systems Protection Board in accordance with such procedures as the Merit Systems Protection Board shall prescribe, except that *in no event* may any such appeal be brought—
>
> (A) before the 61st day after the date on which the complaint is filed; or

> (B) later than 15 days after the date on which the complainant receives written notification from the Secretary under subsection (c)(2).

5 U.S.C. § 3330a(d)(1) (emphasis added). If the "in no event" language is not meant to foreclose tolling, it would be entirely superfluous. *See Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001) (adopting construction of a statute that avoids rendering statute's language "insignificant, if not wholly superfluous"); *Williams v. Taylor*, 529 U.S. 362, 404, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) ("It is . . . a cardinal principle of statutory construction that we must 'give effect, if possible to every clause and word of a statute.' *United States v. Menasche*, 348 U.S. 528, 538-39, 75 S. Ct. 513, 99 L. Ed. 615 (1955)." (additional citations omitted)). To permit equitable tolling in spite of the "in no event" language would be "inconsistent with the text of the relevant statute" and therefore impermissible. *See Beggerly*, 524 U.S. at 48, 118 S. Ct. 1862. "In no event" is equivalent to stating "there shall be no exceptions." Short of saying "equitable tolling shall not apply,"[2] Congress could not have been clearer.

Other circuit courts agree that when Congress includes the "in no event" clause in a statute, Congress means what it says. *See Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1043 (10th Cir. 1980) (interpreting the "in no event" language in the Interstate Land Sales Full Disclosure Act ("ILSFDA," 15 U.S.C. § 1711) and stating "[t]he last sentence of this section uses

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[2] Appellant proffered this language to the court during oral argument, but could point to no statute in which Congress used this language.

strong and unambiguous terms which, if not meant to create an absolute bar to untimely suits under the ILDSFA, are extraneous and meaningless"); *Caviness v. DeRand Res. Corp.*, 983 F.2d 1295, 1301 (4th Cir. 1993) (stating that permitting equitable tolling of section 13 of the Securities Act of 1933 "would require us to ignore the plain meaning of the language that says 'in no event' may an action be filed more than three years after the sale and defeat the very purpose of the statute of repose"); *Webb v. United States*, 66 F.3d 691, 701-02 (4th Cir. 1995) (citing *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1391-92 (7th Cir. 1990), which concluded that "[u]nless the 'in no event more than three' language cuts off claims of tolling and estoppel at three years . . . it serves no purpose at all"); *Dubuc v. Johnson*, 314 F.3d 1205, 1209 (10th Cir. 2003) (noting the irony that the language "in no event" must lead to a result contrary to the purpose of 28 U.S.C. § 1915(g), but finding this insufficient to "justify the judicial repeal of § 1915(g)'s 'in no event' language"); *Hodgson v. Int'l Printing Pressmen & Assistants' Union of N. Am.*, 440 F.2d 1113, 1116-17 (6th Cir. 1971) (stating "[i]t may, however, be significant that the more emphatic language 'but in no event after 60 days' was not adopted" in assessing the applicability of equitable tolling to 29 U.S.C. § 482(b) (1964)).

The majority would like to divorce the analysis of Congress's intent from the words of the statute. The majority suggests that the Supreme Court pays "little, if any attention to the specific language" of the statute when determining whether Congress intended the statute to be tollable. *Maj. op.* at 839. This narrow reading of equitable tolling case law is inconsistent with basic and fundamental tenets of statutory construction, which attempt to discern congressional intent by first looking to the

language of the statute itself. *See Lamie v. United States Tr.*, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004) ("The starting point in discerning congressional intent is the existing statutory text. . . ."); *Holloway v. United States*, 526 U.S. 1, 6, 119 S. Ct. 966, 143 L. Ed. 2d 1 (1999) ("[T]he language of the statutes that Congress enacts provides the most reliable evidence of its intent. For that reason, we typically begin the task of statutory construction by focusing on the words that the drafters have chosen."); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409, 113 S. Ct. 2151, 124 L. Ed. 2d 368 (1993) ("The starting point in interpreting a statute is its language. . . ."); *United States v. Scharton*, 285 U.S. 518, 521, 52 S. Ct. 416, 76 L. Ed. 917 (1932) ("We are required to ascertain the intent of Congress from the language used [in the statute]."). In my view, the Supreme Court's equitable tolling cases, like all statutory interpretation cases, require us to consider the language chosen by Congress to determine whether Congress intended that equitable tolling apply. *See Beggerly*, 524 U.S. at 48, 118 S. Ct. 1862 ("equitable tolling is not permissible where it is inconsistent with the text of the relevant statute"); *Brockamp*, 519 U.S. at 350-52, 117 S. Ct. 849 (looking at the "unusually emphatic form" for the statute and holding that "linguistically speaking" the statute uses "language that is not simple").

The majority suggests that the Supreme Court's decision in *Bailey v. Glover*, 21 Wall. 342, 88 U.S. 342, 349, 22 L. Ed. 636 (1874), underscores the minimal importance of the language of the statute in determining congressional intent. *Maj. op.* at 838-39 ("[D]espite the statute's admonishment that 'no suit . . . shall in any case be maintainable,' the Court, nonetheless, found that equitable relief was not inconsistent."). In my opinion, *Bailey*

fails to support to the majority's insistence that we ignore the plain language of the statute in determining congressional intent regarding equitable tolling. That case did not involve the "in no event" language used here but rather a less emphatic reference to "in any case," meaning merely that the statute applied generally. *Bailey* is not an equitable tolling case. In that case, the Supreme Court adopted what has come to be known as the "fraudulent concealment doctrine." In the event of fraud, the Supreme Court held that equity would intervene to prevent the claim from accruing despite the statute's language that "no suit in law or equity shall in any case be maintained . . . unless brought within two years." *Id.* *Bailey*, therefore, deals with when a claim accrues and the statute begins to run, carving out an exception to statutes of limitations when the facts giving rise to the cause of action have been fraudulently concealed from a claimant.[3] *Id.* at 349-50. Because there are no allegations that Kirkendall's appeal was not timely filed due to fraudulent concealment by the government, this narrow exception does not apply. In fact,

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[3] Although *Bailey* has been cited in cases wording the applicable doctrine as "equitable tolling," this does not change the limited nature of the holding in *Bailey*. For example, in *Lampf*, the petitioner's arguments were directed to whether fraud should equitably relax the deadline at issue. 501 U.S. at 363, 111 S. Ct. 2773 ("Thus, this Court has said that in the usual case, 'where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.'") Read in context, the Supreme Court's citation of *Bailey* in *Lampf* makes sense. Therefore, I do not read the Supreme Court's decisions as interjecting *Bailey*'s fraudulent concealment doctrine into all equitable tolling cases where fraud is not at issue.

Kirkendall's counsel conceded during oral argument that the present appeal addresses equitable tolling and not claim accrual.

B.

Reading the emphatic "in no event" language as it is used in the context of the entire VEOA further evinces Congress's intent to preclude tolling. In all other parts of the VEOA, Congress used less emphatic language to establish time limits. For example, the statute says that a complaint with the DoL "must be filed within 60 days after the date of the alleged violation." 5 U.S.C. § 3330a(a)(2)(A). If a claimant chooses to pursue redress through the district courts rather than the administrative process, they must do so "not later than 60 days after the date of the election." 5 U.S.C. § 3330b(a) (2000 & Supp. 2006). Section 3330b(b) states: "[a]n election under this section may not be made—(1) before the 121st day after the date on which the appeal is filed with the Merit Systems Protection Board." None of the other sections of the VEOA say "in no event." All other time limits for pursuing action under the VEOA allow for longer time limits and use language which is far less emphatic. Yet, Congress chose a more rigid time period for bringing actions to the Board once the administrative process was underway. Again, proper weight should be given to the words Congress chose, especially where Congress itself has drawn a distinction in the words it used in the same statute. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 n.9, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004) (stating that there is a "usual rule that when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended" (internal citations

and quotations omitted)); *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983); 2A N. Singer, *Sutherland Statutory Construction* § 46:6 (6th ed. 2000) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended."); *United States v. Ahlers*, 305 F.3d 54, 59-60 (1st Cir. 2002) ("It is accepted lore that when Congress uses certain words in one part of a statute, but omits them in another, an inquiring court should presume that this differential draftsmanship was deliberate."). The use of the "in no event" language alongside less emphatic language in the VEOA further convinces me that Congress intended to foreclose equitable tolling in the appeals portion of the process.

C.

Read as a whole, the VEOA is detailed and technical; it sets forth various time limits for filing at the different stages of the administrative process. These time limits are detailed and sequential and further support my conclusion that Congress did not intend the 15-day time period in subsection (d)(1)(B) to be equitably tolled as that deadline stands in the middle of the sequential administrative redress process.[4] The structure of subsection (d)(1) is technical in nature and is like the two-tiered structure employed in section 13 of the 1933 Securities

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[4] The majority suggests that the short 15-day time period favors tolling, relying on the three-and twelve-year periods of *Lampf* and *Beggerly*. *Maj. op.* at 841. The statutes at issue there, however, were limitation periods for bringing actions, rather than time for review provisions, as in this case. This distinction is an important one. There is clearly an interest in expeditious resolution of employment disputes once in progress, thereby justifying much shorter time limits.

Act discussed in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S. Ct. 2773, 115 L. Ed. 2d 321 (1991). The *Brockamp* factor (that detailed, technical language weighs against tolling) focuses on the detail in the statute's enumeration of the time limits rather than an analysis of the technical nature of the underlying subject matter to which the statute pertains. *See Brockamp*, 117 S. Ct. at 851-52 (discussing the detailed, technical language used to set forth the statute's time limits). The statute in question does not merely prohibit an appeal more than 15 days after receiving notice from the DoL regarding the results of its investigation, but also prohibits the filing of an appeal before the 61st day. *See* 5 U.S.C. § 3330a(d)(1). The statute, in this case, details a specific window during which the appeal must be filed; it cannot be filed too early (before the 61st day after the date on which the complaint is filed) or too late (more than 15 days after the DoL notice is received). *Id.*

Although the majority also considers the nature of this window for the appeals process created by Congress, it draws incorrect inferences from it. The majority suggests that the purpose of the "in no event" language is to "introduce[ ] a timing requirement that is not a 'deadline'" and merely "emphasize[s] Congress' intent to provide a 60-day window left exclusively for DoL review." *Maj. op.* at 838. The majority's conclusion is self-contradictory. The "in no event" language cannot demonstrate congressional intent to bar an early appeal to the Board, but at the same time permit an appeal filed after the 15-day time period—the "in no event" clause applies equally to both subsection (d)(1)(A) and (d)(1)(B).

D.

The substance or subject matter of the statute also leads me to believe that Congress did not intend equitable tolling to apply to the 15-day deadline. The majority believes that the policies underlying section 3330a compel the conclusion that the 15-day deadline in section 3330a(d)(1)(B) is subject to equitable tolling. *Maj. op.* at 841-42, 843-44. It is true that, when possible, veterans' benefits legislation should be "liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285, 66 S. Ct. 1105, 90 L. Ed. 1230 (1946). Courts must, however, be mindful that a statute's correct construction is consistent with the language Congress chose to use in the statute. The VEOA's redress mechanism is "modeled after the procedures established in [USERRA]." [S. Rep. No.] 105-340, 1998 WL 658809, at *16 (1998). There is no time limit for filing a USERRA complaint with the Board. *See* 5 C.F.R. § 1208.12 ("there is no time limit for filing a USERRA appeal directly with the Board"). That the VEOA, an employment statute, includes time limitations for filing with the Board whereas USERRA, an anti-discrimination statute, does not include any such limitation, further weighs in favor of concluding that tolling of the 15-day deadline is inappropriate. Congress's choice of emphatic language coupled with a relatively short deadline for filing an appeal strongly support the notion that Congress acted deliberately and intended the result that it legislated—particularly where the statute upon which the VEOA was based included no time limits for filing an appeal.

Moreover, Congress chose to codify the VEOA in Chapter 33, Title 5, the section of the United States Code directed to government organization and employees, whereas USERRA is codified in Title 38, which relates to statutory veterans' benefits. Claims under the VEOA challenge the methodology used by the federal government in reaching hiring decisions and could result in changes in the way that agencies make such decisions. Once a challenge to an agency's hiring decision has been made, it ought to be resolved expeditiously otherwise uncertainty remains in the government hiring process. Obviously, the government would prefer not to pay two people to do one job and the longer it takes to resolve the hiring dispute, the more money in the way of back pay is at stake. It is therefore important that VEOA complaints are resolved expeditiously so that the government can operate efficiently. *Accord* 5 U.S.C. § 3301 (2000) (giving the executive power to promulgate such regulations as "will best promote the efficiency of service").

E.

It is also significant that this statute is one specifying the time for filing an appeal. Although in *Bailey v. West* we rejected the notion that statutes "specifying the time for review cannot be subject to equitable tolling because such statutes are mandatory and jurisdictional," our holding in *Bailey* does not preclude us from considering the context of the deadline as relevant to the *Brockamp* subject matter inquiry.[5] *Bailey*, 160 F.3d at 1367; *see*

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[5] To the extent that *Bailey* is read as permitting equitable tolling even where a statute is decisively "mandatory and jurisdictional" it would seem inconsistent with Supreme Court precedent. *Missouri v. Jenkins*, 495 U.S. 33, 45, 110 S. Ct. 1651, 109 L. Ed. 2d 31 (1990); *Stone v. INS*, 514 U.S. 386, 405, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995); *see*

also Oja v. Dep't of the Army, 405 F.3d 1349, 1359 (Fed. Cir. 2005). Our opinion in *Bailey* itself recognizes that the Supreme Court has found statutes specifying the time for review to be "mandatory and jurisdictional" and "not subject to equitable tolling." 160 F.3d at 1366-67; *see also Stone v. INS*, 514 U.S. 386, 405, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995) (holding that judicial review provisions "are mandatory and jurisdictional . . . and are not subject to equitable tolling" (internal citations and quotations omitted)); *Missouri v. Jenkins*, 495 U.S. 33, 45, 110 S. Ct. 1651, 109 L. Ed. 2d 31 (1990) (stating that the 90-day time period for filing a petition for certiorari in a civil case is "mandatory and jurisdictional" and that the Court does not have "authority to extend the period for filing except as Congress permits"). Hence, while the fact that the time limit at issue is for filing an appeal rather than an initial cause of action may not be dispositive, we find the context relevant to our analysis. Appeals in this case are filed after the appellant has received notice regarding the specific time periods and location for appealing. In this case, Kirkendall received notification from DoL that his complaint was dismissed as untimely on November 29, 2001. This notification stated that Kirkendall had "the right to take [his] claim to the Merit Staffing [sic Systems] Protection Board

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also Neverson v. Farquharson, 366 F.3d 32, 40 n.8 (1st Cir. 2004) ("[I]t may be that when a time limit is phrased in jurisdictional terms, the *Irwin* presumption is rebutted"; "the Supreme Court after *Irwin* has continued to characterize 'jurisdictional' time limits as ineligible for equitable tolling."). If *Stone* and *Jenkins* are interpreted as prohibiting equitable tolling of statutory time limits that are mandatory and jurisdictional, equitable tolling would not be permitted in this case because section 3330a(d)(1) is the sole statutory section providing an individual the ability to appeal a VEOA violation to the board.

(MSPB), that claim must be filed *within 15 days* of the date following the receipt of this notification." U.S. DoL Ltr. to Kirkendall (Nov. 29, 2001) (emphasis in original). Kirkendall did not file his appeal with the Board until June 13, 2002—nearly six months later. For initial filings, in contrast, litigants are often without information as to statutes of limitations periods or even appropriate methods of filing for redress. Accordingly, the nature of the deadline in this case, i.e., the time for filing an appeal, where notice about the filing deadline and requirements had been given, further weighs against a finding that equitable tolling applies.

F.

Although Congress did not create any exceptions to the filing deadlines in section 3330a(d)(1) or repeat the time periods for filing an appeal, these factors cannot outweigh the evidence that Congress did not intend equitable tolling apply to the 15-day time period. Congress may not have allowed for exceptions because it did not intend for there to be any—as the "in no event" language plainly suggests. Moreover, when Congress speaks clearly expressing its intent that "in no event" may the time period be extended, it seems inappropriate to conclude that the fact that it did not say it twice ought to weigh against giving force and effect to Congress's words. Hence, while repetition and exceptions may weigh in favor of precluding equitable tolling, and certainly Supreme Court cases confirm that they do, *e.g.*, *Brockamp*, 519 U.S. at 352, 117 S. Ct. 849, it does not

necessarily follow that the absence of these factors favors permitting tolling.[6]

After considering: the emphatic language which Congress chose to articulate the particular timeframe at issue especially when compared to other timeframes in the VEOA; the detailed nature of the redress process in the VEOA; the detailed administrative redress scheme of which 3330a(d)(1) is a small, yet central part of; the fact that the VEOA pertains to federal employment decisions; that the deadline is akin an appellate deadline that is, in many ways, mandatory and jurisdictional in that it is the sole statute providing the Board's jurisdiction over VEOA claims, I cannot conclude that Congress intended that section 3330a(d)(1)(B) be equitably tolled. Because Kirkendall failed to meet the 15-day deadline for filing an appeal to the Board on his VEOA claim, and that deadline is not subject to equitable tolling, I respectfully dissent.

II. *Right to a Hearing on USERRA Claim*

The lead opinion holds that section 4324(c)(1) "unambiguously" requires the Board to provide Kirkendall a hearing on his USERRA claim.[7] I do not agree with the interpretation of the statute reached in the lead opinion. Rather, I conclude that the Board's own regulations, rather than anything in USERRA, provide Kirkendall with the right to a hearing under section 7701 of Title 5.

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[6] For example, had Congress said "equitable tolling shall not apply," would the majority still suggest that because they did not say it twice or allow exceptions, tolling is permitted?

[7] Notably, no party or amici at any time during any of the proceedings before this court suggested that section 4324(c)(1) provides an automatic right to a hearing as the majority holds.

It is for this reason that I concur only in the result with respect to Part II of the lead opinion.

A.

Section 4324(c)(1) provides in full:

> The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b), without regard as to whether the complaint accrued before, on, or after October 13, 1994. A person who seeks *a hearing or adjudication* by submitting such a complaint under this paragraph *may be represented at such hearing or adjudication* in accordance with the rules of the Board.

38 U.S.C. § 4324(c)(1) (2000) (emphasis added). The plurality relies heavily on the language that that Board "shall adjudicate any complaint brought before [it]." *Maj. op.* at 844 (quoting section 4324(c)(1)). Nothing in the statute requires that "adjudication" automatically include a "hearing." In fact, the word "adjudication" is used disjunctively from the term "hearing" and indicates that they have different meanings. *Sosa*, 542 U.S. at 712 n.9, 124 S. Ct. 2739. The plurality believes that any interpretation of the statute that does not confer the right to a hearing renders the "at such hearing" language of the statute "nonsensical." *Maj. op.* at 844. To reach this conclusion the plurality ignores the words of the statute, which permit representation in the court of "such hearing *or adjudication.*" 38 U.S.C. § 4324(c)(1) (emphasis added). The statute only requires: (1) retroactivity; and (2) that a person be entitled to representation when the Board hears or adjudicates their USERRA claims. *Id.*

This statute cannot reasonably be read to mandate a right to a hearing on all USERRA claims.

Even if section 4324(c)(1) were ambiguous, which it is not, the legislative history demonstrates that during the enactment of this section changes were made to the statutory language to address concerns regarding whether the Office of Special Counsel would be required to represent USERRA claimants or how representation would be made available. *See, e.g.*, JOINT EXPLANATORY STATEMENT ON H.R. 955, 140 CONG. REC. H9136 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2493, 2509-10 (explaining the adoption of the Senate proposal that an "individual would be able to be represented before the MSPB by a representative of choice"); S. Rep. No. 103-158, at 37 (1993) (stating that USERRA would "[e]nable Federal executive agency employees . . . to receive representation by the Office of Special Counsel before the MSPB and the U.S. Court of Appeals for the Federal Circuit"). I have found nothing in the legislative history that suggests that Congress intended section 4324(c)(1) to mandate that the Board provide a hearing to all USERRA claimants. In fact, the legislative history, as reflected in the statute, indicates that the Board would be free to promulgate rules to govern the USERRA claims process. *See* 38 U.S.C. § 4331(2)(A) (2000); S. Rep. No. 103-158, at 75 (1993) ("Although [the Board] may have authority under title 5, United States Code, to prescribe necessary regulations, explicit inclusion of that authority in chapter 43 of title 38 would remove any doubt on this matter."); *see also* 5 U.S.C. § 1204(a)(1) (2000) (amended with enactment of USERRA to permit the Board to "hear, adjudicate, or provide for the *hearing or adjudication,* of all matters within the jurisdiction of the Board under . . .

[USERRA], or any other law, rule, or regulation . . ." (emphasis added)).

Although the plurality determines that the statutory language unambiguously requires a hearing, the majority also relies on *Fishgold*, 328 U.S. at 285, 66 S. Ct. 1105 and *King v. St. Vincent's Hospital*, 502 U.S. 215, 220 n.9, 112 S. Ct. 570, 116 L. Ed. 2d 578 (1991), to conclude that "it is abundantly clear that Congress' intent is to provide veterans a hea: ing upon request, especially because" we resolve statutory ambiguities in favor of the veteran. *Maj. op.* at 845-46. The statute is unambiguous and, in my opinion, does not convey an automatic right to a hearing.

B.

Although I do not believe section 4324 conveys a right to a hearing in every case, I do conclude Kirkendall is entitled to a hearing based on the Board's regulations. Section 7701 of Title 5 of the United States Code applies to appeals to the Board "under any law, rule, or regulation." *See also* 5 U.S.C. § 1204(a)(1) (2000) (giving the Board authority to hear or adjudicate any matter brought within its jurisdiction by "any . . . rule, or regulation"). The plain import of this language permits appeals to lie with the Board not only under laws, but also under rules and regulations. Here, the Board has promulgated regulations that invoke section 7701 by repeatedly defining USERRA claims as "appeals" and by placing these claims within its appellate jurisdiction.[8] *See* 5 C.F.R. §§ 1201.3(b)(1), 1208.4(a), 1208.13. The Board's

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[8] In fact, the Board's regulations refer to USERRA actions as "appeals" 29 times and the person bringing the action before the Board as the "appellant" 28 times.

regulations clearly define USERRA claims to be within the Board's appellate jurisdiction. *See, e.g.*, 5 C.F.R. § 1201.3(b)(1); *Petersen v. Dep't of the Interior*, 71 M.S.P.R. 227, 234 (1996) (stating that "both the language and legislative history of USERRA make it evident that all cases under USERRA brought by the individual appellants fall within the Board's appellate jurisdiction"). The Board's intent when it enacted the rules enabling USERRA was clear: USERRA actions are "appeals." *See* 65 Fed.Reg. 49,895 (Aug. 16, 2000) (notice of final rulemaking for subpart 1208 referring to USERRA claims as "appeals"); 65 Fed.Reg. 5,409 (Feb. 4, 2000) (addressing new subpart 1208 and continuing to refer to USERRA claims as "appeals"); 62 Fed.Reg. 66,813 (Dec. 22, 1997) (stating that USERRA provides federal employees expanded rights "including a new statutory right to appeal a USERRA violation to the MSPB"). Given that the Board treats USERRA proceedings as appeals, USERRA proceedings are subject to the procedures specified in section 7701 and Kirkendall had a right to a hearing.[9]

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[9] The Board interpreted 5 C.F.R. § 1208.13 as permitting it to exercise discretion on whether or not Kirkendall was entitled to a hearing. *Kirkendall v. Dep't of the Army*, AT-343-02-0622-B-1, AT-0330-02-0621-B-1 at 6 n.3. Because the Board has consistently treated USERRA actions as "appeals," its interpretation of 5 C.F.R. § 1208.13 as giving it discretion to grant a hearing in a USERRA action is improper and inconsistent with the body of its regulations.

BRYSON, Circuit Judge, with whom LOURIE, RADER, and DYK, Circuit Judges, join, and with whom SCHALL and LINN, Circuit Judges, join in part, dissenting.*

I respectfully dissent as to both issues in this case. With respect to the first issue—whether equitable tolling may apply to the 15-day limitations period under the Veterans Employment Opportunities Act of 1998 ("VEOA"), Pub. L. No. 105-339—I join Judge Moore's dissent. With respect to the second issue—whether a complainant has an automatic right to a hearing before the Merit Systems Protection Board under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), Pub. L. No. 103-353—I dissent from the court's disposition for the reasons set forth below.

The Board's USERRA regulation provides, and the Board has consistently held, that USERRA complainants have no absolute statutory or regulatory right to a hearing, but that hearings may be conducted at the discretion of the administrative judge presiding over the proceeding. The Board's consistent practice under its USERRA regulation has been to direct its administrative judges to hold hearings in USERRA cases when there are disputed issues of material fact, but not to require hearings in every case in which one is requested. *See, e.g., Wooten v. Dep't of Veterans Affairs*, 102 M.S.P.R. 131, 135-36 (2006); *Perih v. Dep't of Veterans Affairs*, 102 M.S.P.R. 454, 457 (2006); *Mills v. Dep't of Transp.*, 101 M.S.P.R. 610, 614 (2006); *Jordan v. U.S. Postal Serv.*, 90 M.S.P.R. 525, 529 (2002), *aff'd*, 82 Fed. Appx. 42 (Fed. Cir. 2003).[1]

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* Judges Schall and Linn join this dissent with respect to the USERRA issue.

[1] The Board's practice in USERRA cases is consistent with the practice of many other federal administrative agencies that have "opted

Judge Mayer's opinion takes the position that the right to a hearing before the Board in USERRA cases is guaranteed by both the USERRA statute itself, 38 U.S.C. § 4324, and by the statute that gives the Board jurisdiction over appeals from agency decisions, 5 U.S.C. § 7701. Judge Moore's concurring opinion disagrees with that statutory analysis but takes the position that the right to a hearing is created by Board regulation. I disagree with both views and conclude that, as the Board has consistently held, neither those statutes nor the Board's regulations provide an automatic right to a hearing in USERRA cases. Even if the statutes and regulations are considered unclear on this point, the Board's interpretations of the pertinent statutes and its own regulations are entitled to deference under well-established principles of administrative law. The Board's resolution of the USERRA hearing issue should therefore be upheld.

I

The analysis begins with 5 U.S.C. § 7701(a), which provides that "[a]n employee or applicant for employment may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation." Section 7701

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to make available procedures for the summary disposition of adjudicatory matters." *Puerto Rico Aqueduct & Sewer Auth. v. Envtl. Prot. Agency*, 35 F.3d 600, 606 (1st Cir. 1994); *see Costle v. Pac. Legal Found.*, 445 U.S. 198, 214, 100 S. Ct. 1095, 63 L. Ed. 2d 329 (1980) (referring with approval to agency rules requiring a party who seeks a hearing to "tender[] evidence suggesting the need for a hearing"); *State of Pa. v. Riley*, 84 F.3d 125, 130 (3d Cir. 1996) (administrative hearing not required absent a disputed material issue of fact); 32 Charles Alan Wright & Charles H. Koch, Jr., *Federal Practice & Procedure* § 8230 (2006).

sets forth a number of procedural rights that attach to matters that are appealable to the Board. For present purposes, the most important is that the appellant has the right "to a hearing for which a transcript will be kept." *Id.* § 7701(a)(1).

A

The statutory trigger for applying section 7701 and its prescribed procedures is that the action must be "appealable to the Board under any law, rule, or regulation." The paradigmatic example of an action that is made "appealable to the Board under any law" is an adverse agency action under 5 U.S.C. § 7512, from which an employee "is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title." *Id.* § 7513(d). There are a number of other actions that are also made appealable to the Board under section 7701, such as those in which appeals are authorized under 5 U.S.C. §§ 3593(c)(2) (appeal from denial of reinstatement in Senior Executive Service), 3595(c) (appeal from removal from Senior Executive Service due to reduction in force), 4303(e) (appeal from reduction in grade or removal for unacceptable performance), 7543(d) (appeal from removal or suspension from Senior Executive Service), 8347(d)(2) (appeal from finding of disability based on mental condition, for employees covered by the Civil Service Retirement System), and 8461(e)(2) (same, for employees covered by the Federal Employees' Retirement System). In each of those instances, Congress referred to the action before the Board as an "appeal" and expressly referred to the appeal as being subject to section 7701.

In addition to the statutory sources of authority for appeals to the Board, a number of regulatory provi-

sions promulgated by the Office of Personnel Management ("OPM") authorize section 7701 appeals. This court has listed several examples of Board "jurisdiction conferred by [OPM] regulation," including "the board's authority to hear certain probationers' appeals (5 C.F.R. §§ 315.806, 315.908), and appeals concerning reductions-in-force (5 C.F.R. § 315.901), and reemployment rights (5 C.F.R. § 352.209)." *Maule v. Merit Sys. Prot. Bd.*, 812 F.2d 1396, 1398 n.2 (Fed. Cir. 1987); *see also Hellman v. Office of Pers. Mgmt.*, 9 MSPB 839, 10 M.S.P.R. 639, 642-43 (1982). Other OPM regulations that authorize appeals to the Board include 5 C.F.R. §§ 302.501, 330.209, 352.313, 352.508, 352.707, 352.807, and 353.304 (all authorizing appeals to the Board from denials of reinstatement, reemployment, and restoration in various circumstances), 359.805 (authorizing appeals to the Board from improper furloughs), 731.501 (authorizing appeals to the Board from unsuitability determinations), 300.104 (authorizing appeals from applications of unlawful employment practices by OPM), and 839.1302 (authorizing appeals from adverse decisions under Federal Erroneous Retirement Coverage Corrections Act). As this court's decisions make clear, those OPM regulations are the sources of the right to appeal to the Board; because they make particular actions "appealable to the Board under any . . . regulation," 5 U.S.C. § 7701(a), they are the triggers for applying the section 7701 procedures. *See Sturdy v. Dep't of the Army*, 440 F.3d 1328, 1333 (Fed. Cir. 2006) (right to appeal from reemployment priority decision established by OPM regulation); *Roberto v. Dep't of the Navy*, 440 F.3d 1341, 1353 (Fed. Cir. 2006) (same); *Meeker v. Merit Sys. Prot. Bd.*, 319 F.3d 1368, 1373 (Fed. Cir. 2003) (OPM regulation grants

Board jurisdiction over appeal from OPM's application of employment practices); *Maule*, 812 F.2d at 1398 n.2.

Importantly, the Board's jurisdiction is not limited to the appeals referred to in section 7701. In particular, the Board has jurisdiction over other actions that are not statutorily denominated "appeals," *see* 5 U.S.C. § 1221(a) (individual right of action for whistleblower claims), or in which the governing statutes prescribe procedures other than those set forth in section 7701, *see* 5 U.S.C. § 3330a(d)(1) (VEOA); *id.* §§ 8347(d)(1), 8461(e)(1) (review of agency action in certain disability retirement cases). One such statute is USERRA, which provides that a person claiming to have been denied a right created by the statute "may submit a complaint against a Federal executive agency or the Office of Personnel Management," which will be adjudicated by the Board. 38 U.S.C. § 4324.

The USERRA statute does not refer to the proceeding before the Board as an "appeal," and it does not refer to section 7701 as providing the procedures for adjudicating USERRA complaints before the Board. Therefore, section 7701 does not confer an absolute right to a hearing before the Board in USERRA cases. Such a right, if conferred by statute, must be found in the USERRA statute itself. Contrary to the position taken in Judge Mayer's opinion, however, the USERRA statute does not confer such a right. Although the USERRA statute refers to the possibility of a hearing on a complaint brought before the Board, 38 U.S.C. §§ 4324(c)(1), 4324(c)(4), it does not state that the complainant has an automatic right to a hearing. Section 4324(c)(1) of USERRA provides that the Board "shall adjudicate any complaint brought before the Board" pursuant to USERRA and

refers to a person "who seeks a hearing or adjudication by submitting such a complaint." 38 U.S.C. § 4324(c)(1). Nothing in that formulation, however, gives complainants an absolute right to a hearing, just as the general run of administrative statutes that provide for a hearing have not been construed to require an automatic hearing in the absence of a material factual dispute. *See* note 1, *supra.* Instead, section 4324(c)(1) simply echoes the language used in the Board's general authorizing statute, 5 U.S.C. § 1204(a)(1), which gives the Board authority to "hear, adjudicate, or provide for the hearing or adjudication of all matters within the jurisdiction of the Board," a provision that plainly does not confer an absolute right to a hearing in every proceeding before the Board.

B

As the Board points out in its amicus curiae brief, the fact that Congress chose to grant the Board specific authority to create procedures for USERRA proceedings is further evidence that Congress regarded USERRA proceedings as not being governed by section 7701. Section 7701 already has a provision granting the Board authority to adopt procedures for appeals governed by that statute. If USERRA proceedings fell within section 7701, the USERRA provision giving the Board the authority to promulgate procedural regulations, 38 U.S.C. § 4331(b)(2)(A), would be redundant.

The legislative background of section 4331(b)(2)(A) supports the inference that Congress intended for the Board to be able to prescribe different procedures for USERRA cases than it employed for section 7701 appeals. The original bill that ultimately became USERRA lacked any provision authorizing the Board to promulgate regulations to govern cases within its new USERRA

jurisdiction. In a written submission to the Senate committee, the Board urged that such a provision be included so that it would be clear that the Board could promulgate procedural regulations specific to USERRA cases. The Board explained that "[m]aking the Board's regulatory power explicit for [USERRA] purposes would assure that the Board could issue regulations tailored to the requirements of [USERRA] cases." *Legislation Relating to Reemployment Rights, Educational Assistance, and the U.S. Court of Veterans Appeals: Hearing before the S. Comm. On Veterans' Affairs*, 102d Cong., 1st Sess. 309-10 (1991). The bill was amended as the Board requested. The new provision ultimately became section 4331(b)(2)(A) of USERRA, which the Board invoked in promulgating its new USERRA regulation giving the Board discretion with regard to holding hearings in USERRA cases, 5 C.F.R. § 1208.13(b). Congress's affirmative response to the Board's request for specific authorization to promulgate procedural regulations "tailored to the requirements" of USERRA cases is a further indication that Congress did not intend for the new class of USERRA claims to be governed by the procedures set forth in section 7701 and the Board's regulation promulgated under the authority of that provision.

C

This court's cases recognize that the procedures prescribed in section 7701 do not govern all matters before the Board, or even all matters involving Board review of an initial decisionmaker distinct from the Board. An instructive case that addresses the scope of section 7701 is *Lindahl v. Office of Personnel Management*, 776 F.2d 276 (Fed. Cir. 1985). There, the court dealt with the procedures used for appeals from OPM decisions in disabil-

ity retirement cases under 5 U.S.C. § 8347(d). Congress delegated to the Board the authority to prescribe procedures for such cases, and the Board did so, providing *inter alia* that in voluntary retirement cases the individual would bear the burden of proof. *Lindahl* appealed, arguing that section 7701 applied to the disability proceedings, which the Board termed "appeals," and that the agency should bear the burden of proof, as dictated by section 7701(c). This court rejected that argument. As part of its rationale, the court noted that Congress had given the Board independent statutory authority to prescribe procedures for disability retirement cases and thus could not be deemed to have intended for the section 7701 procedures to apply. 776 F.2d at 278-79. The court reached that conclusion even though the statute at issue in *Lindahl* referred to the disability proceeding before the Board as an "appeal." In this case, the USERRA statute not only provides separate rulemaking authority for the Board but also does not refer to the proceedings before the Board as "appeals." The argument for finding section 7701 inapplicable is therefore even stronger here than it was in *Lindahl.*

The differing burden of proof in section 7701 appeals and USERRA cases provides further evidence that USERRA cases are not "appeals" governed by section 7701. Section 7701 provides that in all appeals under that section, with one narrow exception, the agency bears the burden of proof by a preponderance of the evidence to sustain the agency action on appeal. 5 U.S.C. § 7701(c)(1)(B). However, in *Sheehan v. Dep't of the Navy,* 240 F.3d 1009, 1013 (Fed. Cir. 2001), this court held that in USERRA discrimination cases the employee or applicant who makes a claim of discrimination bears the initial burden of proof of showing, by a preponder-

ance of the evidence, that the employee's military service was "a substantial or motivating factor" in the adverse employment action, a different standard than that applicable under section 7701(c).[2] If section 7701 covered all proceedings before the Board, including USERRA proceedings, there would be a conflict between the express burden of proof provision of section 7701 and the different burden of proof found to be applicable in USERRA discrimination cases. There was no need for Congress to reconcile the conflicting burdens of proof under the two statutes for the simple reason that USERRA discrimination complaints were not made subject to section 7701.

D

Because section 7701 does not govern USERRA proceedings and because the reference in section 4324(c)(1) of USERRA to a person "who seeks a hearing or adjudication" does not confer an absolute right to a hearing before the Board, neither statute provides a source for the right that Mr. Kirkendall asserts. Even if the reference to a "hearing or adjudication" in section 4324(c)(1) were considered ambiguous, however, the Board has interpreted that language as not granting an absolute right to a hearing. That interpretation, adopted through notice-and-comment rulemaking, is a reasonable one and is therefore entitled to deference under the principles of

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[2] In addition to prohibiting discrimination based on military service, *see* 38 U.S.C. § 4311, USERRA strengthened the prior legal protections for service members seeking restoration to employment, *see* 38 U.S.C. §§ 4312-4316. The Board has distinguished restoration cases from discrimination cases with respect to the burden of proof, holding that in restoration cases the burden falls on the agency to prove that it met its statutory obligations. See *Wyatt v. U.S. Postal Serv.*, 101 M.S.P.R. 28, 36 (2006); *Clavin v. U.S. Postal Serv.*, 99 M.S.P.R. 619, 622-23 (2005).

Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). *See United States v. Mead Corp.*, 533 U.S. 218, 229-30, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001); *Hawkins v. United States*, 469 F.3d 993, 1000, 1002 (Fed. Cir. 2006); *Elkem Metals Co. v. United States*, 468 F.3d 795, 800-02 (Fed. Cir. 2006); *Motorola, Inc. v. United States*, 436 F.3d 1357, 1364-66 (Fed. Cir. 2006).

The Board's regulations sharply distinguish between appeals governed by section 7701 and other matters within its jurisdiction, such as USERRA cases. In its regulations setting forth the procedures applicable to appeals governed by section 7701, which are found at 5 C.F.R. part 1201 (specifically, at 5 C.F.R. §§ 1201.11-1201.121), the Board relied on 5 U.S.C. § 7701(k), the subsection of section 7701 that authorizes the Board to "prescribe regulations to carry out the purpose of this section." *See* 54 Fed. Reg. 53505 (Dec. 29, 1989); 51 Fed. Reg. 25147 (July 10, 1986). Those regulations, like section 7701 itself, provide that an appellant "has a right to a hearing" in an appeal before the Board. 5 C.F.R. § 1201.24(d). The Board, however, has promulgated a separate regulation setting forth the procedures that apply in USERRA proceedings. In adopting that regulation, which is found in 5 C.F.R. part 1208 (specifically, 5 C.F.R. §§ 1208.11-1208.16), the Board relied on 38 U.S.C. § 4331(b)(2)(A), the subsection of the USERRA statute that grants the Board authority to prescribe regulations to carry out its activities under USERRA. *See* 65 Fed. Reg. 5412 (Feb. 4, 2000). The Board has made clear that USERRA proceedings are governed by the regulation in part 1208 to the extent that it supplements or conflicts with the regulations in part 1201. *See* 5 C.F.R. § 1201.3(b)(1).

Unlike the regulations in part 1201, the USERRA regulation in part 1208 does not provide that a complainant has an automatic right to a hearing before the Board, but instead provides that if the complainant submits a timely request for a hearing, a hearing "may be provided" either on the merits of the dispute or on the issue of jurisdiction. 5 C.F.R. § 1208.13(b). Since promulgating the USERRA regulation in 2000, the Board has consistently interpreted it as giving the Board discretion in determining whether to hold hearings in USERRA cases. *See Smith v. Dep't of Justice*, 103 M.S.P.R. 207, 213 (2006); *Jordan*, 90 M.S.P.R. at 528; *Metzenbaum v. Dep't of Justice*, 89 M.S.P.R. 285, 290 (2001). In the absence of a clear statutory directive that hearings be held in USERRA cases whenever a complainant makes a timely request, the Board's contrary interpretation is entitled to deference and should be sustained.

II

All this would be straightforward enough, and would seem to leave no room for doubt that the Board has discretion whether to provide a hearing in a USERRA case, except for one complication. In its regulations, the Board has chosen to divide the universe of actions before it into two categories, "original" and "appellate." Based on that perhaps unfortunate choice of terms, Judge Moore's opinion concludes that all the actions the Board classified as within its "appellate" jurisdiction are "appeals" for purposes of section 7701. The Board has made clear, however, that its regulations should not be interpreted in that manner, and it is a mistake for us not to take the Board at its word with respect to the meaning of its own regulations.

A

In the Board's USERRA regulation, a "complaint" or "action," as those terms are used in USERRA, is categorized as an "appeal" for purposes of the regulation. 5 C.F.R. § 1208.4(a). But the Board has made clear that by denominating USERRA complaints or actions as "appeals" for purposes of the regulation, it did not convert USERRA complaints into appeals that fall within section 7701 and are therefore subject to all the procedures mandated by section 7701. The Board explained the matter in detail in a case decided shortly after the Board adopted its USERRA regulation:

> The Board's statement [in the USERRA regulation] that "appeal" is inclusive in this manner indicates an effort on its part to achieve consistency in describing matters that the Board is authorized to review. It does not purport to suggest that, because USERRA complaints are "appeals," they are, by definition, appealable to the Board pursuant to 5 U.S.C. § 7701. . . . In adopting [the USERRA] regulation, the Board stated that it was adding USERRA actions to the list of appealable actions (as opposed to those which fall under the Board's "original jurisdiction"). . . . There was no suggestion that the Board thereby considered that USERRA actions were appealable under 5 U.S.C. § 7701, and that they were, therefore, covered by 5 U.S.C. § 7702. As noted above, the USERRA statute itself did not provide that the Board's appellate procedures at 5 U.S.C. § 7701 would apply. And the Board's case law, as it developed, was, and continues to be, wholly consistent with that notion. . . . This is so regardless of whether the Board refers to such claims in its regulations as ap-

> peals or complaints. The terminology used simply does not, nor can it, render these matters subject to the statutory provisions of 5 U.S.C. §§ 7701 and 7702 when the USERRA statute itself does not so indicate.

Metzenbaum, 89 M.S.P.R. at 290-92; *see also Jordan*, 90 M.S.P.R. at 529 n.2 (USERRA complaints are not adjudicated under 5 U.S.C. § 7701, and therefore section 7701's prohibition against summary judgment does not apply); *Bodus v. Dep't of the Air Force*, 82 M.S.P.R. 508, 516 (1999) (USERRA complaints are not appeals, but petitions for remedial action).

As the Board explained, its procedural regulations in 5 C.F.R. §§ 1201-1208 do not purport to create rights of appeal, either generally or in USERRA cases. Those regulations merely set forth the procedures applicable to cases in which rights of action before the Board are created by other sources, i.e., by statute or by OPM regulation. For that reason, it is not important whether the Board's regulations call particular proceedings "complaints," "appeals," or otherwise. What matters is whether a particular agency action is made "appealable under any statute, rule, or regulation" within the meaning of 5 U.S.C. § 7701(a). That issue is not resolved by looking to the Board's regulations that govern the procedures to be followed in actions over which the Board has been accorded jurisdiction.

The Board's regulation that sets forth the components of what it terms its "appellate jurisdiction," 5 C.F.R. § 1201.3, makes this point clear. Subsection (a) of that regulation enumerates the appeals governed by the procedures of section 7701, describing each of those appeals as being "authorized by law, rule, or regulation," the triggering language of section 7701. Section 1201.3

then sets forth each of the 20 types of appeals that are authorized by law, rule, or regulation, along with the statute or regulation that authorizes an appeal in each case. For example, section 1201.3(a)(1) refers to appeals from reductions in grade or removal for unacceptable performance, and it then cites the regulatory and statutory source of the authority for taking such appeals (5 C.F.R. part 432 and 5 U.S.C. § 4303(e)). Section 1201.3(a) thus makes clear that it is not section 1201 itself that provides the statutory or regulatory authority for the appeals, and that section 1201 merely lists those cases in which the Board has been granted appellate jurisdiction through other statutory or regulartory authorization. Significantly, the Board does not list USERRA proceedings in section 1201.3(a), which uses the triggering language of section 7701. Instead, USERRA proceedings are listed in 5 C.F.R. § 1201.3(b)(1), a separate subsection of section 1201.3. The Board's own "appellate jurisdiction" regulation therefore does not characterize USERRA claims as among those in which "appeals are authorized by law, rule, or regulation" and thus governed by the procedures of section 7701.

The subsection of the USERRA regulation that refers to the Board's jurisdiction reinforces the same point. That subsection, 5 C.F.R. § 1208.2, states that the right to review by the Board in USERRA cases derives from the USERRA statute, 38 U.S.C. § 4324. In order to determine whether the procedures of section 7701 apply, we therefore must determine whether the USERRA statute creates a right of appeal under section 7701. The statute itself makes clear that it does not. The USERRA statute makes no reference to an appeal and no reference to section 7701. Moreover, as noted, the USERRA stat-

ute does not invoke the procedures of section 7701, either explicitly or implicitly; instead, the USERRA statute directs the Board to formulate its own regulartions governing USERRA proceedings. *See* 38 U.S.C. § 4331(b)(2)(A). The Board has done so by including a regulatory provision governing when hearings will be afforded in USERRA cases. 5 C.F.R. § 1208.13(b). Section 7701 therefore has no role to play with respect to actions before the Board authorized by USERRA.

B

Interpreting the Board's USERRA regulation as conferring an automatic right to a hearing is also contrary to the plain language of the regulation and the Board's consistent interpretation of it. The pertinent subsection reads as follows:

> An appellant must submit any request for a hearing with the USERRA appeal, or within any other time period the judge sets. A hearing may be provided to the appellant once the Board's jurisdiction over the appeal is established. The judge may also order a hearing if necessary to resolve issues of jurisdiction.

5 C.F.R. § 1208.13(b).

That regulation cannot reasonably be read to provide an automatic right to a hearing upon request. The word "may," which defines the right to a hearing in the regulation, "customarily connotes discretion," *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 346, 125 S. Ct. 694, 160 L. Ed. 2d 708 (2005), and we have routinely construed statutes and regulations containing the word "may" as granting discretion to the agency in question, *see Green v. Gen. Servs. Admin.*, 220 F.3d 1313,

1317-18 (Fed. Cir. 2000) (the use of the word "may" in an OPM regulation vests agency with discretion); *Hubbard v. Merit Sys. Prot. Bd.*, 205 F.3d 1315, 1320 (Fed. Cir. 2000) (use of the word "may" in a statute shows "intent to provide . . . broad discretion"). Moreover, the language in the Board's USERRA regulation stands in sharp contrast with the language the Board uses in its regulations that apply to section 7701 appeals, where the Board simply states that "an appellant has a right to a hearing," 5 C.F.R. § 1201.24(d).[3]

More importantly, the Board has consistently construed its USERRA regulation as making hearings in USERRA cases discretionary with the Board. *See Metzenbaum*, 89 M.S.P.R. at 290; *see also Smith*, 103 M.S.P.R. at 213; *Perfilio v. Dep't of the Air Force*, 102 M.S.P.R. 444, 448 (2006); *Williams v. Dep't of the Air Force*, 97 M.S.P.R. 252, 254 n.* (2004); *Schoch v. Dep't of the Army*, 91 M.S.P.R. 134, 135 (2001); *Jordan*, 90 M.S.P.R. at 529. It is well settled that an administrative agency's interpretation of its own regulations is entitled to substantial deference from a reviewing court. *See Lyng v. Payne*, 476 U.S. 926, 939, 106 S. Ct. 2333, 90 L. Ed. 2d 921 (1986). Because an agency is the master of its own regulations, the deference we accord to an agency's construction of its own regulations is even greater than

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[3] The Board has used similar wording in addressing the right to a hearing in VEOA appeals, 5 C.F.R. § 1208.23(b) ("[a] hearing may be provided"), which the Board interprets as conferring discretion to conduct a hearing, see *Sherwood v. Dep't of Veterans Affairs*, 88 M.S.P.R. 208, 212-13 (2001). By contrast, in referring to the right to a hearing on the merits of an individual right of action appeal, the Board has stated that the appellant "has a right to a hearing," 5 C.F.R. § 1209.6(b), the same language that the Board has used in 5 C.F.R. § 1201.24(d), which governs section 7701 appeals.

the deference we accord to an agency's construction of the statute it is charged with enforcing. *See Gose v. U.S. Postal Serv.*, 451 F.3d 831, 837 (Fed. Cir. 2006) ("We defer even more broadly to an agency's interpretations of its own regulations than to its interpretation of statutes, because the agency, as the promulgator of the regulation, is particularly well suited to speak to its original intent in adopting the regulation."); *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1363-64 (Fed. Cir. 2005) ("[I]t is well settled that an agency's interpretation of its own regulations is entitled to broad deference from the courts. Deference to an agency's interpretation of its own regulations is broader than deference to the agency's construction of a statute, because in the latter case the agency is addressing Congress's intentions, while in the former it is addressing its own."). In addition, the Board has been consistent in its interpretation of the regulation governing hearings in USERRA cases, a factor that further enhances the agency's entitlement to deference with regard to its construction of its own regulation. *See Gose*, 451 F.3d at 837 ("Deference is particularly appropriate when the agency interpretation has been consistently applied.").

Given the high degree of deference due, there is no justification for rejecting the Board's sensible interpretation of its USERRA regulation regarding hearings in favor of a much less natural interpretation. The Board's interpretation of its regulations accords with the plain meaning of the regulations and is not inconsistent with any statute or other regulatory provision. To interpret the Board's regulations otherwise converts an administrative choice of nomenclature into a creation of rights. That is not what the Board tells us it did, and there is no

reason not to defer to the Board's explanation of what its regulations do. The Board's regulations do not create a right of appeal with respect to USERRA complaints, and thus do not provide USERRA complainants an automatic right to a hearing under section 7701(a)(1).

Because I disagree with the analysis in both of the opinions that make up the majority in this case, I respectfully dissent from the court's disposition of the USERRA hearing issue.

DYK, Circuit Judge, dissenting.

I join Judge Bryson's opinion dissenting from the majority's decision on the USERRA hearing issue, and I join Part I of Judge Moore's opinion dissenting from the majority's decision on the VEOA equitable tolling issue. I agree with Judge Moore that even if a presumption of equitable tolling applies to this statute, that presumption has been rebutted. I write separately to note that, in my view, the doctrine of equitable tolling and the accompanying presumption should not apply to appeal periods in either the judicial or the administrative context.

The doctrine of equitable tolling is designed to militate the harsh results that would flow from the strict application of statutes of limitations. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990). The fundamental error in today's decision lies in applying that doctrine to a statute providing a time for appeal. This error traces back to our 1998 decision in *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998) (en banc). There we held that equitable tolling could apply to an administrative appeal period—in that case the period governing appeal to the Court of Veterans Appeals of a denial of service connection by the Board of

Veterans' Appeals. Four dissenting judges urged that the *Bailey* majority's holding was inconsistent with the Supreme Court's decisions in *Stone v. INS*, 514 U.S. 386, 405, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995) (citing *Missouri v. Jenkins*, 495 U.S. 33, 45, 110 S. Ct. 1651, 109 L. Ed. 2d 31 (1990)), which held that periods of appeal are mandatory and jurisdictional and not subject to tolling.[1]

Since our decision in *Bailey* the Supreme Court's cases have admittedly clouded the "jurisdictional" nature of appeal periods, but have not undermined the strictness of the rule for appellate time limits mandated in *Stone* and *Jenkins*. In *Kontrick v. Ryan*, 540 U.S. 443, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004), the Court held that claim-processing rules (such as the time limitation for objecting to the debtor's discharge in the bankruptcy rule at issue in the case) are not properly termed jurisdictional, and cautioned about "less than meticulous" use of the term jurisdictional. *Id.* at 454-55, 124 S. Ct. 906. The Court reiterated this warning in *Eberhart v. United States*. 546 U.S. 12, 126 S. Ct. 403, 404-05, 163 L. Ed. 2d 14 (2005). *See also Scarborough v. Principi*, 541 U.S. 401, 413, 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004). *Kontrick* and related cases at most suggest that time for appeal provisions are not jurisdictional—and hence waivable—though the question whether those provisions are jurisdictional is itself under review by the Supreme

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[1] The Supreme Court's earlier decision in *Bowen v. City of New York*, 476 U.S. 467, 106 S. Ct. 2022, 90 L. Ed. 2d 462 (1986), admittedly is in some tension with the Supreme Court's later cases. In *Bowen* the Supreme Court held that a 60-day period for filing a civil action in district court to review a decision of the Social Security Administration was subject to equitable tolling. 476 U.S. at 471-72, 481, 106 S. Ct. 2022. However, the Supreme Court repeatedly referred to the 60-day period at issue as a "statute of limitations," rather than an appellate deadline.

Court. *Bowles v. Russell*, ___U.S. ___, 127 S. Ct. 763, 166 L. Ed. 2d 590 (2006) (granting petition for writ of certiorari).[2] Whether or not appeal periods are jurisdictional, *Kontrick* and its progeny do not suggest that appeal periods are subject to equitable tolling.

The majority of circuits to consider the question in the past few years have held that time for appeal provisions must be strictly enforced. Some circuits have concluded that such provisions remain mandatory and jurisdictional. *Alva v. Teen Help*, 469 F.3d 946, 952-53 (10th Cir. 2006) (holding that Fed. R. App. Proc. 4 remains jurisdictional since "[n]either *Eberhart* nor *Kontrick* affects the jurisdictional nature of the timely filing of an [sic] civil appeal"); *Bowles v. Russell*, 432 F.3d 668, 671 n.1 (6th Cir. 2005), cert. *granted*, ____ U.S. ___, 127 S. Ct. 763, 166 L. Ed. 2d 590 (2006) (holding that Fed. R. App. Proc. 4 remains jurisdictional after *Kontrick); see also Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 393 (4th Cir. 2004) (assuming, after *Kontrick*, that Fed. R. App. Proc. 4 is jurisdictional). If appeal periods are mandatory and jurisdictional, as the dissent in *Bailey* urged, it is difficult to see how they could be subject to general equitable tolling. 160 F.3d at 1371-72.

Other circuits have held that even though the time limits may not be jurisdictional, they must be strictly enforced nonetheless. *In re Johns-Manville Corp.*, 476 F.3d 118, 2007 WL 106516, at *4 (2d Cir. Jan. 17, 2007)

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[2] *Bowles* appears also to present the question whether some form of equitable tolling is available with respect to appeal periods. *See* Brief of Petitioner at 14, *Bowles v. Russell*, No. 06-5306, 2007 WL 215255 (U.S. Jan. 19, 2007).

("[W]hether a cross-appeal time limit is jurisdictional or, after *Eberhart*, only a 'claim-processing rule,' we conclude that *Eberhart* strongly indicates that we are to enforce that limit strictly, once it is properly invoked."); *United States v. Leijano-Cruz*, 473 F.3d 571, 574 (5th Cir. 2006) ("[T]he district court does not err, after *Eberhart*, if it enforces an inflexible claim processing rule, and we may not reverse its decision to do so."). So far as I have been able to determine, only the Ninth Circuit disagrees. *See Socop-Gonzalez v. INS*, 272 F.3d 1176, 1192-93 (9th Cir. 2001).

In my view the circuits holding that appeal periods are to be strictly enforced are correct, and our decision in *Bailey* was incorrect.[3] As the Seventh Circuit has recently concluded, "[i]t is hard to see why a court should invoke equitable tolling to supply a litigant with more time to apply for review of an agency's decision. The period for seeking administrative review, like the time for appealing a decision of the district court, usually is brief because a contest is ongoing." *Farzana K. v. Indiana Dep't of Educ.*, 473 F.3d 703, 706 (7th Cir. 2007).[4]

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[3] Even our own circuit has not been entirely consistent. *See Oja v. Dep't of Army*, 405 F.3d 1349, 1359 (Fed. Cir. 2005) (appeal period not subject to equitable tolling).

[4] It is hard to see why a court should invoke equitable tolling to supply a litigant with more time to apply for review of an agency's decision. The period for seeking administrative review, like the time for appealing a decision of the district court, usually is brief because a contest is ongoing. The loser simply notifies the other side (by a petition for review or a notice of appeal) that argument will resume in another forum. A lawyer who misses the time to file a notice of appeal cannot invoke "*equitable tolling*" to justify the delay. Rules may allow judges to grant extra time. See Fed. R. App. P. 4(a)(5), (6). Once the time as extended under the Rules lapses, however, *common-law tolling is unavailable*; the existence of rules specifying when (and how far)

There are, moreover, powerful reasons to doubt that Congress intended equitable tolling of the short periods provided for appeal, because of the implications of such provisions on the smooth functioning of the judicial and administrative systems. As noted, the presumption of equitable tolling recognized in *Irwin*, 498 U.S. at 95-96, 111 S. Ct. 453 and *United States v. Brockamp*, 519 U.S. 347, 350, 117 S. Ct. 849, 136 L. Ed. 2d 818 (1997), arose in the context of statutes of limitations. When a statute of limitations is tolled, the efficient functioning of the adjudicatory system is not impacted because statutes of limitations merely govern the time when a case is first filed. In contrast equitable tolling of appeal periods creates a risk of making finality unattainable. For example, in this case the appellant urges that he was disabled from filing an appeal because of mental incapacity. The majority's holding naturally implies that, if established, this would equitably toll the appeal period for the duration of his incapacity, even though that might render the decision under review non-final for many years. Under such

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time may be extended is incompatible with an open-ended power to add extra time on "equitable" grounds. Indeed, the Supreme Court has characterized the time limit for appellate review within a unitary system as "jurisdictional," e.g., *Browder v. Director of Corrections*, 434 U.S. 257, 98 S. Ct. 556, 54 L. Ed. 2d 521 (1978), and although *Eberhart* calls that characterization into question, the Court continues to insist that "mandatory" rules be enforced whether or not they are dubbed "jurisdictional." Allowing more time under the rubric of equitable tolling, when a federal rule covers the subject of extensions, would just contradict the rule—and for no good reason. Once a litigant has received one or more decisions (whether from district courts or hearing officers under the IDEA) after formal adjudication, there is little point in bending the rules to allow another. 473 F.3d at 706 (emphasis added).

circumstances, the setting of a short period for appeal becomes meaningless.

Nor do I see why equitable tolling of appeal periods is necessary in the interests of fairness. Unlike a potential litigant confronting a statute of limitations, an individual who appeals an adverse decision has already determined to commence a judicial or administrative proceeding and has demonstrated the ability to participate in the process. Typically as well, in administrative cases the losing party receives actual notice of the time for appeal. If some relief for appellate time limits is necessary in the interests of fairness, Congress can explicitly provide a limited exception, as has been done in Rule 4(a)(5) of the Federal Rules of Appellate Procedure. I see no basis for applying the general doctrine of equitable tolling and its presumption to appeal periods.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 05-3077

JOHN E. KIRKENDALL, PETITIONER

v.

DEPARTMENT OF THE ARMY, RESPONDENT

Jan. 3, 2006

ORDER

Before MICHEL, Chief Judge, NEWMAN, MAYER, LOURIE, CLEVENGER, RADER, SCHALL, BRYSON, GAJARSA, LINN, DYK, and PROST, Circuit Judges.

PER CURIAM.

A combined petition for panel rehearing and rehearing *en banc* having been filed by respondent, and response thereto having been waived by petitioner, the petition for panel rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing *en banc* having been referred to the circuit judges who are in regular active service,

IT IS ORDERED THAT:

The petition for rehearing *en banc* is granted.

The court vacates the panel's judgment and original opinion entered June 22, 2005, *John E. Kirkendall v. Department of the Army*, 412 F.3d 1273 (Fed. Cir. 2005).

The court has appointed Theodore Olson of Washington, DC to represent the petitioner. The parties are invited to submit new briefs addressing the following issues:

(1) Is the 15-day period for filing appeals to the Merit Systems Protection Board set forth in 5 U.S.C. § 3330a subject to equitable tolling? *See* 5 U.S.C. § 3330a(d)(1)(B) ("[T]he complainant may elect to appeal the alleged violation to the Merit Systems Protection Board . . ., except that in no event may any such appeal be brought— . . . (B) later than 15 days after the date on which the complainant receives written notification from the Secretary under subjection (c)(2)."); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990); *United States v. Brockamp*, 519 U.S. 347, 117 S. Ct. 849, 136 L. Ed. 2d 818 (1997); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S. Ct. 2773, 115 L. Ed. 2d 321 (1991).

(2) Is the 60-day period for filing a claim with the Secretary of Labor set forth in 5 U.S.C. § 3330a subject to equitable tolling? *See* 5 U.S.C. § 3330a(a)(2)(A) ("A complaint under this section must be filed within 60 days after the alleged violation.").

(3) Are all veterans who allege a violation of the Uniformed Services Employment and Reemployment Rights Act entitled to a hearing pursuant to 5 U.S.C. § 7701? *See* 5 U.S.C. § 7712.

This case will be reheard *en banc* on the basis of the new briefs addressing the issues set forth above. An original and thirty copies of all briefs shall be filed, and two copies served on opposing counsel. Any brief from the petitioner shall be filed forty days from the date of this order; any brief from the respondent thirty days thereafter; and any reply from the petitioner fifteen days after the date the respondent's additional brief is due. Briefs shall adhere to the type-volume limitations set forth in Federal Rule of Appellate Procedure 32 and Federal Circuit Rule 32.

Briefs of amici curiae will be entertained in accordance with Federal Rule of Appellate Procedure 29 and Federal Circuit Rule 29. The question of oral argument will be resolved at a later date.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 05-3077

JOHN E. KIRKENDALL, PETITIONER

v.

DEPARTMENT OF THE ARMY, RESPONDENT

[DECIDED: June 22, 2005]

Before MAYER, Circuit Judge, PLAGER, Senior Circuit Judge, and DYK, Circuit Judge.

Opinion for the court filed by Circuit Judge MAYER. Dissenting opinion filed by Circuit Judge DYK.

MAYER, Circuit Judge.

John E. Kirkendall appeals the decision of the Merit Systems Protection Board, which dismissed his claims that he had been discriminated against in violation of the Veterans Employment Opportunities Act of 1998 ("VEOA"), 5 U.S.C. § 3330a (2000), and the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4311 (2000). *Kirkendall v. Dep't of the Army,* AT-3443-02-0622-I-1, AT0330020621-B-1, 97 M.S.P.R. 605, 2004 WL 2359294 (MSPB Oct. 13, 2004). Because the VEOA is subject to equitable tolling and Kirkendall is entitled to a hearing on his USERRA claim, we reverse and remand.

Background

Kirkendall, a 100% disabled veteran who suffers from organic brain syndrome, applied for a position as a Supervisory Equipment Specialist (Aircraft), GS-1670-12, with the Department of the Army ("agency") at Fort Bragg, North Carolina. Kirkendall's service and resulting disability entitled him to a 10-point preference. He included a resumé with his application, which indicated, *inter alia*, that he had admirably served as the Commander of a Direct Support Platoon at Fort Bragg, and as a Force Integration Officer and an Executive Officer/Commander at Fort Bliss, Texas. In addition, Kirkendall's resumé listed numerous, specific duties he had performed, as well as several technical courses he had taken while in the Army. On January 5, 2000, the agency found that Kirkendall's application lacked sufficient detail regarding his experience and rated him ineligible for the position. Kenneth Black, also a 10-point preference eligible veteran, was chosen to fill the position.

Kirkendall filed several complaints with the agency contesting his non-selection, all of which were denied. He then filed a formal complaint with the Department of Labor ("DoL") claiming a violation of his veterans' preference rights and discrimination based on his disability. On November 29, 2001, DoL rejected the complaint because it had not been filed within 60 days of the agency's alleged violation as required by 5 U.S.C. § 3330a(a)(2)(A). On June 13, 2002, Kirkendall appealed to the Merit Systems Protection Board.

The administrative judge ("AJ") dismissed Kirkendall's VEOA claim as untimely and his USERRA claim for failure to state a claim. The board affirmed the AJ's decision that the VEOA claim was precluded for failure

to timely file, but reversed the determination that Kirkendall had failed to state a proper claim for relief. Rather, the board held that Kirkendall's assertion that he was not selected based on his status as a disabled veteran was cognizable under USERRA. On remand, the AJ held, without a hearing, that Kirkendall had offered no proof that his veteran status was a substantial or motivating factor in his non-selection. The AJ further held that discrimination could not be inferred because: (1) Kirkendall's non-selection was based on the indefiniteness of his application; (2) all other applicants on the Certificate of Eligibles were veterans; and (3) a veteran, who was eligible for a 10-point preference, was selected for the position. The AJ's remand decision was adopted by the board when review was denied.

Kirkendall appeals the board's decision to this court, claiming that the board erred by failing to toll the filing periods contained in 5 U.S.C. § 3330a and by refusing to hold a hearing on his USERRA claim. We exercise jurisdiction pursuant to 28 U.S.C. § 1295(a)(9).

Discussion

We are presented with three issues: (1) is the 60-day filing deadline contained in 5 U.S.C. § 3330a(a)(2)(A) subject to equitable tolling; (2) is the 15-day filing deadline contained in 5 U.S.C. § 3330a(d)(1)(B) subject to equitable tolling; and (3) are veterans entitled to a hearing regarding their USERRA claims. Because each of these questions involves the interpretation of a statute, we review the board's decision *de novo*. *See Pitsker v. Office of Pers. Mgmt.*, 234 F.3d 1378, 1381 (Fed. Cir. 2000) ("Statutory interpretation is a question of law which we review *de novo*.").

I. *Equitable Tolling*

The agency contends that the board lacks jurisdiction over Kirkendall's VEOA claim for two reasons. First, he failed to file his complaint with DoL within 60 days of the decision not to list him on the Certificate of Eligibles[1] as required by subsection 3330a(a)(2)(A).[2] Second, he failed to appeal DoL's determination to the board within 15 days as required by subsection 3330a(d)(1)(B).[3] In response, Kirkendall argues that both filing periods are subject to equitable tolling and that his severe disability justifies tolling in this case.

In *Irwin v. Department of Veterans Affairs,* 498 U.S. 89, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990), the Supreme Court established a presumption in favor of equitable tolling in suits against the government when permitted in analogous private litigation. In an attempt to honor congressional intent, the Court later held that this presumption can be rebutted if "there [is] good reason to believe that Congress did *not* want the equitable tolling doctrine to apply." *United States v. Brockamp,* 519 U.S. 347, 350, 117 S. Ct. 849, 136 L. Ed. 2d 818 (1997). Five factors evince a contrary congressional intent: "[a] statute's detail, its technical language, its multiple iterations

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[1] While it is unclear when Kirkendall filed his complaint with DoL, it is undisputed that he failed to satisfy the 60-day deadline.

[2] 5 U.S.C. § 3330a(a)(2)(A) states that "[a] complaint under this subsection must be filed within 60 days after the date of the alleged violation."

[3] 5 U.S.C. § 3330a(d)(1)(B) states that "the complainant may elect to appeal the alleged violation to the Merit Systems Protection Board . . ., except that in no event may any such appeal be brought—. . . (B) later than 15 days after the date on which the complainant receives written notification from the Secretary under subsection (c)(2)."

of the limitations period in procedural and substantive form, its explicit inclusion of exceptions, and its underlying subject matter." *Brice v. Sec'y of Health & Human Serv.*, 240 F.3d 1367, 1372 (Fed. Cir. 2001).

There can be little doubt that Kirkendall's employment discrimination claim is analogous to claims brought pursuant to Title VII. *See Irwin*, 498 U.S. at 95, 111 S. Ct. 453 (holding that "the statutory time limits applicable to lawsuits against private employers under Title VII are subject to equitable tolling"); *Brice*, 240 F.3d at 1372 (holding that claims under the Vaccine Act are sufficiently similar to tort claims so as to invoke the *Irwin* presumption). We therefore begin our analysis by assuming that equitable tolling applies. As a result, we need only determine whether the language and context of section 3330a indicate that Congress desired otherwise.

As an initial matter, we must dispose of the agency's contention that the failure to meet the filing deadline in subsection 3330a(a)(2)(A) irrevocably forecloses a veteran from exhausting his administrative remedies, thus precluding jurisdiction in the board. The agency's theory does not comport with our holding in *Bailey v. West*, 160 F.3d 1360, 1364 (Fed. Cir. 1998) (en banc), that the Supreme Court has "not distinguish[ed] among the various kinds of time limitations that may act as conditions to the waiver of sovereign immunity." Furthermore, the agency's theory directly contradicts *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982), a Title VII case, which held that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court,

but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling."

Other courts have likewise held that filing deadlines contained in statutes requiring exhaustion of administrative remedies are not jurisdictional, but rather are subject to equitable relief. For example, in *Edelman v. Lynchburg College*, 300 F.3d 400, 404 (4th Cir. 2002), another Title VII case, the Fourth Circuit held that the exhaustion requirement, like a statute of limitations, can be tolled. *See also Leong v. Potter*, 347 F.3d 1117, 1122 (9th Cir. 2003) ("The exhaustion requirement is akin to a statute of limitations and is subject to waiver, equitable estoppel, and equitable tolling."). Similarly, *Harms v. Internal Revenue Service*, 321 F.3d 1001, 1009 (10th Cir. 2003), held that "the failure to *timely* exhaust administrative remedies [with the MSPB] is not a jurisdictional deficiency but rather is in the nature of a violation of a statute of limitations." In the context of the Occupational Safety and Health Act, the Tenth Circuit held that the requirement that an employee must file a complaint with the Secretary of Labor within 30 days of a violation could be tolled. *Donovan v. Hahner, Foreman & Harness, Inc.*, 736 F.2d 1421, 1424 (10th Cir. 1984) (analyzing 29 U.S.C. § 660(c)(2)). And, the Second Circuit held that the failure to timely exhaust administrative remedies prescribed in the Financial Institution Reform, Recovery, and Enforcement Act can be excused when required by equity. *Carlyle Towers Condo. Ass'n v. Fed. Deposit Ins. Corp.*, 170 F.3d 301, 307 (2d Cir. 1999). We therefore hold that the exhaustion requirement contained in subsection 3330a(a)(2)(A) that a veteran file a complaint with DoL within 60 days of the alleged violation is akin

to a statute of limitations. As such, we apply the same analysis to subsection 3330a(a)(2)(A) as we apply to subsection 3330a(d)(1)(B) in determining whether equitable tolling is allowed.

Turning to the focus of our inquiry, we consider each of the five factors outlined in *Brockamp*, 519 U.S. at 350-53, 117 S. Ct. 849, to determine whether Congress intended that equitable tolling not be allowed. First, section 3330a is not detailed. This is especially true in comparison with other administrative schemes held subject to equitable tolling, such as Title VII, *Irwin*, 498 U.S. at 92, 111 S. Ct. 453, and Social Security, *Bowen v. City of N.Y.*, 476 U.S. 467, 469, 106 S. Ct. 2022, 90 L. Ed. 2d 462 (1986). Similarly, section 3330a is less detailed than the highly complex scheme used to provide benefits to veterans. *See Bailey*, 160 F.3d 1360 (holding that 38 U.S.C. § 7266 is subject to equitable tolling). *But see Brice*, 240 F.3d at 1373 (holding that the National Childhood Vaccine Injury Act is "part of a detailed statutory scheme which includes other strict deadlines").

Second, section 3330a's language is not technical. And, although the language used in subsection 3330a(d)(1)(B) is fairly forceful, the Supreme Court has held that the use of "barred" is, by itself, not sufficient to persuade it that Congress intended to prohibit equitable tolling. *Irwin*, 498 U.S. at 95, 111 S. Ct. 453. Our court came to the same conclusion in *Former Employees of Sonoco Products Co. v. Chao*, 372 F.3d 1291, 1298 (Fed.

Cir. 2004), where we held that 28 U.S.C. § 2636(d)[4] could be tolled.

Third, the timing provisions in section 3330a are not repeated. *See Brockamp,* 519 U.S. at 351, 117 S. Ct. 849 ("[section] 6511 reiterates its limitations several times in several different ways"). Fourth, section 3330a does not contain explicit exceptions to the two filing deadlines. *See Bailey,* 160 F.3d at 1365 ("Likewise, section 7266 does not provide its own exceptions to the general rule."); *see also Brockamp,* 519 U.S. at 351, 117 S. Ct. 849 ("[section] 6511 sets forth explicit exceptions to its basic time limits, and those very specific exceptions do not include 'equitable tolling.'"); *Martinez v. United States,* 333 F.3d 1295, 1318 (Fed. Cir. 2003) (en banc) (finding that 28 U.S.C. § 2501 contains an explicit exception for "persons 'under legal disability'"); *Brice,* 240 F.3d at 1373 ("[T]he Act includes a specific exception from the limitations period for a petition improperly filed in state or federal court.").

The final, and most persuasive of the five *Brockamp* factors, is the underlying subject matter of section 3330a. The purpose of the VEOA is to assist veterans in obtaining gainful employment with the federal government and to provide a mechanism for enforcing this right. In a very real sense, the VEOA is an expression of gratitude by the federal government to the men and women who

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[4] 28 U.S.C. § 2636(d) states that "A civil action contesting a final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 or a final determination of the Secretary of Commerce under section 251 or section 271 of such Act is *barred* unless commenced in accordance with the rules of the Court of International Trade within sixty days after the date of notice of such determination." (emphasis added).

have risked their lives in defense of the United States. It is clear to us that, far from intending a strict interpretation, Congress understood the availability of the *Irwin* presumption, which was well established by 1998 when the VEOA was adopted. We further note that veterans who seek to enforce their rights under the VEOA will often proceed without the benefit of representation, just as Kirkendall did. Under such circumstances, it is "particularly inappropriate" to foreclose equitable relief. *Zipes*, 455 U.S. at 397, 102 S. Ct. 1127 (quoting *Love v. Pullman*, 404 U.S. 522, 527, 92 S. Ct. 616, 30 L. Ed. 2d 679 (1972)); *see also Bowen*, 476 U.S. at 480, 106 S. Ct. 2022 ("The statute of limitations we construe in this case is contained in a statute that Congress designed to be unusually protective of claimants." (internal quotation marks omitted)). And, finally, the limitations periods in section 3330a are exceedingly short—far shorter than the 120-day period we held subject to equitable tolling in *Bailey*, 160 F.3d at 1366.

Having considered the five *Brockamp* factors we are left with the definite and firm conviction that Congress did not intend to override the *Irwin* presumption as to either filing period in section 3330a. As such, we hold that both subsection 3330a(a)(1)(A) and subsection 3330a(d)(1)(B) are subject to equitable tolling. On remand, the board is instructed to assess whether Kirkendall's disability prevented him from complying with the filing requirements. *See Arbas v. Nicholson*, 403 F.3d 1379, 1381 (Fed. Cir. 2005); *Barrett v. Principi*, 363 F.3d 1316, 1321 (Fed. Cir. 2004).

II. *Hearing Rights Under USERRA*

We next address Kirkendall's contention that he was entitled to a hearing on his USERRA claim.[5] The board explained in a footnote that it has discretion in USERRA cases to grant a hearing, and that, because there was no genuine factual dispute, a hearing was unnecessary. In refusing to grant hearings in USERRA cases, the board has argued that 38 U.S.C. § 4324[6] refers to USERRA claims as "complaints," not as "appeals," and therefore 5 U.S.C. § 7701(a),[7] which guarantees a hearing in all *appeals* to the board, does not apply. *See Metzenbaum v. Dep't of Justice*, 240 F.3d 1068, 1071 (Fed. Cir. 2001) (explaining the board's reasoning for holding that USERRA complaints are not "appeals").

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[5] 38 U.S.C. § 4311(a) states that "A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation."

[6] 38 U.S.C. § 4324(c)(1) states that "The Merit Systems Protection Board shall adjudicate any *complaint* brought before the Board pursuant to subsection (a)(2)(A) or (b) . . . . A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board." (emphasis added).

[7] 5 U.S.C. § 7701(a) states that "An employee, or applicant for employment, may submit an *appeal* to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—(1) to a hearing for which a transcript will be kept; and (2) to be represented by an attorney or other representative." (emphasis added).

The board's reasoning defies common sense and contradicts its own regulations. First, the vast majority of cases heard by the board, and subject to section 7701, are "appeals" of employment decisions, disciplinary or otherwise, made in the first instance by an agency. *See, e.g., Price v. Soc. Sec. Admin.*, 398 F.3d 1322 (Fed. Cir. 2005); *Guillebeau v. Dep't of the Navy*, 362 F.3d 1329 (Fed. Cir. 2004); *Knight v. Dep't of Def.*, 332 F.3d 1362 (Fed. Cir. 2003). These cases do not involve a lower tribunal, such as a district court, yet they clearly involve an initial decision maker distinct from the board. In the same way, USERRA claims originate when an agency makes an employment decision (*e.g.*, refuses to hire a veteran). Regardless of the fact that section 4324 uses the term "complaint," these employment decisions are then appealed to the board for review. More troubling, however, is the board's interpretation of sections 4324 and 7701 as providing less procedural protection to veterans who have potentially been victimized than to employees who have been discharged for misconduct. To the contrary, this reasoning is a gross misinterpretation of the purpose of USERRA.

Second, the board itself understood that USERRA claims are "appeals" within the meaning of section 7701 and has promulgated numerous regulations memorializing this understanding. In 5 C.F.R. § 1208.4, the board determined that "(a) Appeal. 'Appeal' means a request for review of an agency action (the same meaning as in 5 C.F.R. § 1201.4(f)) and includes a 'complaint' or 'action' as those terms are used in USERRA (38 U.S.C. [§] 4342)." And in 5 C.F.R. § 1208.13, the board refers to USERRA claims as "appeals" or to USERRA claimants as "appellants" no fewer than fourteen times. And, as noted in *Metzenbaum*, 240 F.3d at 1071, the board inten-

tionally included USERRA claims in its appellate jurisdiction.[8]

For these reasons, section 7701 applies to USERRA cases. Consequently, veterans pursuing USERRA claims before the board are entitled to a hearing.

Conclusion

Accordingly, the decision of the board that the filing periods in 5 U.S.C. § 3330a cannot be tolled and that 5 U.S.C. § 7701 does not apply to USERRA cases is reversed. The case is remanded for further proceedings consistent with this opinion.

Costs

John E. Kirkendall shall have his costs.

REVERSED AND REMANDED.

DYK, Circuit Judge, dissenting.

The majority today holds with respect to the VEOA appeal that when Congress said "in no event may any . . . appeal be brought . . . later than 15 days," it did not really mean "in no event." With respect to the USERRA claim the majority gives "appeal" a different meaning than the well established meaning of that term. I respectfully dissent.

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[8] Even if we did not think it clear that section 7701 applies to USERRA cases, Kirkendall would be entitled to a hearing because the board promulgated regulations pursuant to 38 U.S.C. § 4331(b)(2) bringing USERRA cases within its appellate jurisdiction. *See Metzenbaum v. Dep't of Justice*, 89 M.S.P.R. 285, 289 (2001) ("[USERRA] specifically provided that the Board could prescribe regulations to carry out its activities, [38] U.S.C. § 4331(b)(2)(B), pursuant to Congress' broad authorization of the Board to prescribe such regulations as may be necessary for the performance of its functions, 5 U.S.C. § 1204(h).").

In my view, the Board should be affirmed both on the VEOA claim and on the USERRA claim. Kirkendall has failed to bring his VEOA appeal within 15 days as required by 5 U.S.C. § 3330a(d)(1)(B), and (since the USERRA proceeding is not an appeal) he is not entitled to a hearing under 38 U.S.C. § 4324 because he has failed to establish the existence of a genuine issue of material fact.

I

A

Turning first to the VEOA appeal, the majority holds that 5 U.S.C. § 3330a(d)(1)(B) is subject to equitable tolling under *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990). *Ante* at 1276-77. In every equitable tolling situation the threshold question is whether equitable tolling would be available in comparable private party litigation. As *Irwin* held, "it is evident that no more favorable tolling doctrine may be employed against the Government than is employed in suits between private litigants." 498 U.S. at 96, 111 S. Ct. 453. We reemphasized this rule in *Bailey v. West*: "The rule we draw from *Irwin* is that the doctrine of equitable tolling, *when available in comparable suits of private parties*, is available in suits against the United States, unless Congress has expressed its intent to the contrary." 160 F.3d 1360, 1364 (Fed. Cir. 1998) (en banc) (emphasis added). The majority starts with the premise that: "There can be little doubt that Kirkendall's employment discrimination claim is analogous to claims brought pursuant to Title VII [of the Civil Rights Act]." *Ante* at 1276. Because the Title VII statute of limitations between private parties in district court can be tolled,

the majority holds that the *Irwin* equitable tolling presumption applies. *Ante* at 1276-77.

In my view, the majority's mistake lies in failing to distinguish between original and appellate proceedings. While it is true enough that Kirkendall's VEOA *claim* is analogous to a Title VII discrimination suit, his VEOA *appeal* is not analogous to an original district court civil action. The VEOA specifically states that the action before the Board is an "appeal" from the Department of Labor. *See* 5 U.S.C. § 3330a(d). Kirkendall's VEOA appeal with the Board is thus analogous to an appeal to a court of appeals under Title VII. The analogous appellate filing deadline in private party Title VII cases is 28 U.S.C. § 2107, which is mandatory, jurisdictional, and cannot not be tolled.[1] *Browder v. Dir., Ill. Dep't of Corr.*, 434 U.S. 257, 264-65, 98 S. Ct. 556, 54 L. Ed. 2d 521 (1978); *Oja v. Dep't of the Army*, 405 F.3d 1349, 1358 (Fed. Cir. 2005). Since equitable tolling would not be available for comparable private party litigation, it is not available under the VEOA for Kirkendall's Board appeal.

B

Even if we were to assume that tolling would be available in comparable private party litigation, the question remains whether the statutory language here rebuts the presumption of tolling. Appellate filing deadlines are

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[1] Title VII discrimination suits filed in district court between private parties are subject to a 90-day statute of limitations in 42 U.S.C. § 2000e-5(f) that is not jurisdictional and may be equitably tolled. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982). But an appeal from the original district court proceeding under Title VII to a court of appeals is governed by 28 U.S.C. § 2107.

generally mandatory, jurisdictional, and not subject to equitable tolling. *See Stone v. Immigration & Naturalization Serv.*, 514 U.S. 386, 405, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995) (judicial review of the Board of Immigration Appeals); *Missouri v. Jenkins*, 495 U.S. 33, 45, 110 S. Ct. 1651, 109 L. Ed. 2d 31 (1990) (petitions for writs of certiorari); *Browder*, 434 U.S. at 264-65, 98 S. Ct. 556 (appeals from district court); *Oja*, 405 F.3d at 1360 (judicial review of the Merit Systems Protection Board). Because appellate filing deadlines in general are not subject to equitable tolling between private parties, such filing deadlines will also rarely be subject to equitable tolling against the government.

To be sure, we have held that some appellate filing deadlines may be equitably tolled. We held in *Bailey* that 38 U.S.C. § 7266, the filing deadline in the Court of Appeals for Veterans Claims, may be tolled. 160 F.3d at 1365. *Bailey* is plainly distinguishable. There, the relevant statute merely provided that the appellant "shall file a notice of appeal with the Court within 120 days." 38 U.S.C. § 7266 (2000). This is hardly emphatic language that unequivocally precludes equitable tolling. Rather, it is a prototypical example of what the Supreme Court meant in *United States v. Brockamp*, 519 U.S. 347, 117 S. Ct. 849, 136 L. Ed. 2d 818 (1997), when it stated that "[o]rdinarily limitations statutes use fairly simple language, which one can often plausibly read as containing an implied 'equitable tolling' exception." *Id.* at 350, 117 S. Ct. 849.

However, the Supreme Court in *Brockamp* rejected the argument for tolling because the statute at issue "set[] forth its time limitations in unusually emphatic form." *Id.* Thus, the use of emphatic language is indica-

tive of congressional intent to foreclose equitable tolling. In contrast to the statute at issue in *Bailey,* the language of section 3330a(d)(1)(B) is sufficiently emphatic to rebut any presumption of equitable tolling.

Section 3330a(d)(1)(B) provides:

> [T]he complainant may elect to appeal the alleged violation to the Merit Systems Protection Board . . . , except that *in no event may any such appeal be brought* . . . later than 15 days after the date on which the complainant receives written notification from the Secretary. . . .

5 U.S.C. § 3330a(d)(1)(B) (emphasis added). This is as emphatic, if not more so, than comparable appellate filing deadlines found at 28 U.S.C. § 2107(a)[2] and 5 U.S.C. § 7703(b)(1),[3] which, as we have recently reaffirmed, cannot be tolled. *Oja,* 405 F.3d at 1358-60. The majority correctly notes that some of the other factors considered in *Brockamp* would favor finding equitable tolling available. *Ante* at 1276-78. However, as we held in *Brice v. Secretary of Health and Human Services,* 240 F.3d 1367, 1372-73 (Fed. Cir. 2001), not all the *Brockamp* factors

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[2] 28 U.S.C. § 2107(a) provides:

> *[N]o appeal* shall bring *any* judgment . . . of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment . . .

28 U.S.C. § 2107 (2000) (emphasis added).

[3] 5 U.S.C. § 7703(b)(1) provides:

> Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

5 U.S.C. § 7703(b)(1) (2000).

need to be present to preclude equitable tolling. In my view, the emphatic plain language of section 3330a(d)(1)(B) decisively precludes equitable tolling in this case.

The majority suggests that the language in section 3330a(d)(1)(B) is comparable to the "barred" language in 28 U.S.C. § 2636(d), which we have held can be tolled. *Ante* at 1277. Contrary to the majority, the "barred" language is far less forceful than the "in no event may any . . . appeal be brought" language of § 3330a(d)(1)(B). The Supreme Court addressed almost the exact same statutory language in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S. Ct. 2773, 115 L. Ed. 2d 321 (1991). Section 13 of the Securities Act of 1933 provides:

> No action shall be maintained to enforce any liability created under section 11 or 12(a)(2) unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 12(a)(1), unless brought within one year after the violation upon which it is based.
>
> *In no event shall any such action be brought* to enforce a liability created under section 11 or 12(a)(1) more than three years after the security was bona fide offered to the public, or under section 12(a)(2) more than three years after the sale.

Securities Act of 1933 § 13, codified as amended at 15 U.S.C. § 77m (2000) (emphasis added). The Supreme Court held in *Lampf* that the "3-year limit is a period of repose inconsistent with tolling. . . . Because the pur-

pose of the 3-year limitation is clearly to serve as a cut-off, we hold that tolling principles do not apply to that period." 501 U.S. at 363, 111 S. Ct. 2773. In my view the majority's decision is not consistent with *Lampf.*

Finally, the majority considers it "particularly inappropriate" to literally apply a strict deadline because the VEOA was intended to benefit veterans. *Ante* at 1278. There is, of course, the canon of statutory construction that veterans "legislation is to be liberally construed for the benefit of those who left private life to serve their country." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285, 66 S. Ct. 1105, 90 L. Ed. 1230 (1946). But this canon does not apply unless there is an ambiguity in the statute. In section 3330a(d)(1)(B), there is simply none to be found. "In no event" cannot plausibly be read to contain an equitable tolling exception. *Lampf,* 501 U.S. at 363, 111 S. Ct. 2773.

II

The majority further holds that the Board erred in denying Kirkendall a hearing for his USERRA complaint under 5 U.S.C. § 7701. Section 7701 provides for a mandatory merits hearing in any "appeal" to the Board, whether or not there is a genuine dispute of material fact. *Crispin v. Dep't of Commerce,* 732 F.2d 919, 924 (Fed. Cir. 1984). Section 7512 of Title 5 of the United States Code generally defines the adverse actions that are appealable to the Board. Some agency actions in alleged violation of USERRA are appealable to the Board as adverse actions, for example, a demotion allegedly based on discrimination against the employee's military service. *See Yates v. Merit Sys. Prot. Bd.*, 145 F.3d 1480, 1484 (Fed. Cir. 1998) ("[I]n challenging an adverse action before the Board, an employee of a Federal execu-

tive agency may assert, as an affirmative defense, a violation of USERRA by the agency."). A failure to hire—the action involved here—is not one of the appealable actions under section 7512. The question is whether 38 U.S.C. § 4324 makes all USERRA discrimination claims into appeals under section 7701.

The Board has held that

> pure USERRA cases are not *appeals* of personnel actions. Rather, they are petitions for remedial action . . . . In an appeal before the Board, just like an appeal before a court of appeals, the Board reviews a decision that resulted from a due process proceeding. . . . In a petition for remedial action, the Board, like a trial court, determines only whether the petitioner has proved his or her claim for relief.

Bodus v. Dep't of the Air Force, 82 M.S.P.R. 508, 516 (1999) (emphasis in original); *see Jordan v. U.S. Postal Serv.*, 90 M.S.P.R. 525, 530 (2002). The majority today rejects the Board's view and holds that all USERRA complaints are "appeals," even where there is no adverse action.

The definition of an "appeal" is well established: "It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175, 2 L. Ed. 60 (1803).

Viewed under the *Marbury* definition, a USERRA claim under 38 U.S.C. § 4324 cannot be an appeal. Section 4324 provides:

> (1) The Merit Systems Protection Board shall adjudicate any *complaint* brought before the Board

> . . . . A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.
>
> (2) *If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter* relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.

38 U.S.C. § 4324(c) (2000) (emphasis added). There is no "cause" before the agency which the Board must "revise[ ] and correct[ ]." *Marbury*, 5 U.S. at 175.

The majority nonetheless holds that section 4324 complaints are "appeals" because "USERRA claims originate when an agency makes an employment decision . . . , these employment decisions are then appealed to the board for review." *Ante* at 1278. The majority draws the analogy to section 7512 adverse action appeals heard by the Board under 7701. *Ante* at 1278-79 (citing *Price v. Soc. Sec. Admin.*, 398 F.3d 1322 (Fed. Cir. 2005) (constructive suspension); *Guillebeau v. Dep't of the Navy*, 362 F.3d 1329 (Fed. Cir. 2004) (removal); *Knight v. Dep't of Def.*, 332 F.3d 1362 (Fed. Cir. 2003) (reduction in force demotion)). But Congress does not consider all employment decisions to be appealable adverse actions. The failure to hire (whether or not based on discrimination) is not an adverse action. Under the majority's theory, every employment discrimination claim is an appeal whether or not an adverse action is involved.

The majority's theory in this regard is inconsistent not only with section 7701 but also with our 5 U.S.C. § 7702 jurisprudence. Section 7702 provides for pendent Board jurisdiction over certain discrimination claims, and provides in pertinent part:

> [I]n the case of any employee or applicant for employment who—
>
> > (A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and
> >
> > (B) alleges that a basis for the action was discrimination prohibited by—
> >
> > > (i) section 717 of the Civil Rights Act of 1964,
> >
> > . . .
>
> the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action . . . .

5 U.S.C. § 7702 (2000). The language of section 7702 itself draws a distinction between "issue[s] of discrimination" and "appealable action [s]." The distinction is important because "appealable actions" are sufficient for Board jurisdiction under section 7701, but "issues of discrimination" under section 7702 are pendent claims and cannot provide an independent basis for Board jurisdiction. *Cruz v. Dep't of the Navy*, 934 F.2d 1240, 1243 (Fed. Cir. 1991) (en banc). That is, discrimination claims by themselves are not "appeals" falling under the Board's section 7701 jurisdiction.

To buttress its statutory argument, the majority relies on the Board's regulation at 5 C.F.R. § 1208.4, defining an appeal to include a complaint under USERRA. As the majority points out, we have previously noted this incongruity between the Board's regulations and the Board's holdings in cases such as *Bodus. Metzenbaum v. Dep't of Justice,* 240 F.3d 1068, 1071 (Fed. Cir. 2001). But given the well established meaning of "appeal," the Board's regulations are irrelevant. Even if the Board were otherwise entitled to *Chevron* deference in its interpretation of 5 U.S.C. § 7701 or 38 U.S.C. § 4324, *Chevron* would only apply if the statute were ambiguous. *Gen. Dynamics Land Sys. v. Cline,* 540 U.S. 581, 600, 124 S. Ct. 1236, 157 L. Ed. 2d 1094 (2004). In my view, the statutory requirement of an "appeal" is not ambiguous, and a USERRA complaint is clearly not an appeal. Under this interpretation of the statute, the petitioner here has not raised a genuine issue of material fact and is not entitled to a hearing. I respectfully dissent.

APPENDIX D

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBER:
AT-3443-02-0622-B-1
AT-0330-02-0621-B-1

JOHN E. KIRKENDALL, APPELLANT

v.

DEPARTMENT OF THE ARMY, AGENCY

Date: [Oct. 13, 2004]

FINAL ORDER

John E. Kirkendall, Floral City, Florida, pro se.

Michael L. Larson, Esquire, Ft. Bragg, North Carolina, for the agency.

BEFORE

Neil A. G. McPhie, Acting Chairman
Susanne T. Marshall, Member

The appellant has filed petitions for review in these cases asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as these only when significant new evidence is presented to us that was not available for consideration earlier or

when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petitions for review. The initial decisions of the administrative judge are final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that

filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law as well as review the Board's regulations and other related material at our web site, *http://www.mspb.gov*.

FOR THE BOARD: /s/ MATTHEW SHANN
MATTHEW SHANN
[for] Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.

APPENDIX E

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

DOCKET NUMBER:
AT-3443-02-0622-B-1
AT-0330-02-0621-B-1

JOHN E. KIRKENDALL, APPELLANT

v.

DEPARTMENT OF THE ARMY, AGENCY

Date: Dec. 4, 2003

INITIAL DECISION

John E. Kirkendall, Floral City, Florida, pro se.

Michael L. Larson, Esquire, Ft. Bragg, North Carolina, for the agency.

BEFORE

Raphael Ben-Ami
Administrative Judge

The appellant filed appeals under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans Employment Opportunities Act (VEOA) from the agency's decision rating

him ineligible for a position at Fort Bragg, North Carolina. I dismissed the appeals by initial decision dated September 20, 2002. *See Kirkendall v. Department of the Army*, MSPB Docket Nos. AT-3443-02-0622-I-1, AT-0333-02-0621-I-1 (Initial Decision, Sept. 20, 2002).[1] On the appellant's petition for review, the Board affirmed that portion of my initial decision dealing with his VEOA claim. *See Kirkendall v. Department of the Army*, 94 M.S.P.R. 70, 71 (2003). However, the Board also remanded the matter to this office for further proceedings on the appellant's USERRA claim. *See id.* For the following reasons, the appellant's request for relief under USERRA is DENIED.

BACKGROUND

In December of 1999, the appellant, a 10-point preference-eligible veteran, applied for the position of Supervisory Equipment Specialist (Aircraft), GS-1670-12, with the Department of the Army in Fort Bragg, North Carolina. *See* USERRA Appeal File (UAF), Tab 11, Subtab 4E. By memorandum dated January 5, 2000, the agency informed the appellant that he was rated ineligible for the position because his application lacked details of his experience. *See id.*, Subtab 4G. The appellant filed a formal complaint of discrimination with the agency on April 29, 2000, claiming that he was not afforded veterans' preference in the hiring process and that his disability was improperly relied upon to disqualify him from consideration for the position in question. *See id.*, Subtab 4D. The appellant also filed a

[1] I joined the appeals for decision-making purposes because they contained similar issues and joinder expedited processing of the cases without adversely affecting the interests of either party. *See* 5 C.F.R. § 1201.36.

complaint with the Department of Labor (DoL), claiming a violation of his veterans' preference rights. By letter dated November 29, 2001, DoL advised the appellant that his complaint was untimely because it was not filed within 60 days of the alleged veterans' preference violation, as required by statute. *See* UAF, Tab 1. The appellant was further advised that he could file an appeal with the Board within 15 days of his receipt of DoL's November 29 letter. *See id.*

The appellant filed these appeals on June 13, 2002, claiming, among other things, that his veterans' preference rights were violated and that the agency's decision rating him ineligible for the position constitutes a violation of USERRA. *See* VEOA and USERRA Appeal Files, Tabs 1.

I dismissed the appellant's VEOA appeal for lack of jurisdiction, finding that the DoL rejected the appellant's complaint as untimely without addressing its substance, and that the appellant conceded that his VEOA complaint to DoL was untimely. *See Kirkendall*, slip op. at 3. I also found in the alternative that because the appellant had not filed his appeal until June 13, 2002, long after DoL's November 29, 2001 notification letter and VEOA's 15-day deadline for filing a Board appeal, the appeal must be dismissed because the deadline cannot be waived. *See id.*, slip op. at 4.

In its remand Opinion and Order, the Board found that the appellant's assertion that he was not selected for the position in question based on his status as a disabled veteran was "a claim that can proceed under USERRA." *Kirkendall*, 94 M.S.P.R. at 73. Although noting that the extant record was "void of the necessary

evidence to support this claim," the Board explained that "the relative weakness of factual allegations in support of a USERRA claim is not a ground for dismissing the claim summarily; instead the claim should be denied on the merits if the appellant fails to develop those allegations." *Id.*

The Board thereupon directed me to advise the parties of the different methods of proving a USERRA claim and to explain the USERRA burdens of proof. *See Kirkendall*, 94 M.S.P.R. at 73. In addition, the Board directed me to provide the parties a further opportunity to conduct discovery and thereafter to "expressly rule on whether the appellant has demonstrated the existence of evidence involving the credibility of the parties involved, entitling the appellant to a hearing, or whether the matter can be decided on the basis of the written record." *Id.* The Board also asked that I "incorporate by reference the previous findings and conclusions on the [appellant's] VEOA claim so that the appellant has a single decision addressing both claims." *Id.*

Accordingly, in a September 9, 2003 order, I granted the parties an additional opportunity to conduct discovery. *See* Remand Appeal File (RAF), Tab 2, Order at 3. I also advised the parties of the different methods of proving a USERRA claim and explained the USERRA burdens of proof. *See id.* at 2-3. Finally, I ordered the appellant to identify the method(s) of proof he wished to use to support his USERRA claim and to provide additional evidence and/or argument supportive of his claim. *See id.* at 3.

The appellant's USERRA claim is without merit.

The Board has jurisdiction over USERRA claims under 38 U.S.C. § 4324. *See Kirkendall*, 94 M.S.P.R. at 72 (citing 5 C.F.R. § 1201.3(a)(22)). USERRA prohibits discrimination in employment on the basis of military service. *See id.* (citing *Sheehan v. Department of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001)). The requirements for establishing Board jurisdiction under USERRA are: (1) Performance of duty in a uniformed service of the United States; (2) an allegation of a loss of a benefit of employment; and (3) an allegation that the benefit was lost due to the performance of duty in the uniformed service. *See Yates v. Merit Systems Protection Board*, 145 F.3d 1480 (Fed. Cir. 1998).

The appellant asserted in his appeal that the agency's employment process "discriminated against all disabled veterans 30% or more disabled." UAF, Tab 1. He also asserted that he is a 100% disabled veteran, that his resume included this information, that his application packet included a letter from the Department of Veterans Affairs advising the agency of his disability status, and that he was the only 100% disabled applicant for the position. The appellant further asserted that the agency failed to comply with the "legal obligations" to him as a 30% or more disabled veteran, and that the agency violated "USERRA and the Rehabilitation Act" by not selecting him for the position based on his military service and his service-connected disability. *See id.*

The appellant provided evidence showing that he performed duty in a uniformed service. *See* UAF, Tab 9. In addition, the appellant's claim that he was not selected for the position based on his status as a disabled

veteran is cognizable under USERRA. *See Kirkendall*, 94 M.S.P.R. at 73. However, for the following reasons, I find appellant's USERRA claim to be without merit.

An appellant making a claim of discrimination under USERRA bears the initial burden of showing, by a preponderance of the evidence,[2] that his military service was at least "a substantial or motivating factor" in the adverse employment action. *See Fox v. U.S. Postal Service*, 88 M.S.P.R. 381, 385 (2001) (citing *Sheehan*, 240 F.3d at 1013). An appellant may prove discriminatory motive or intent by either direct or circumstantial (indirect) evidence. *See id.* (citing *Sheehan*, 240 F.3d at 1014). Discriminatory motivation under USERRA may be reasonably inferred from a variety of factors, including disparate treatment of certain employees compared to other employees with similar work records. *See Matz v. Department of Veterans Affairs*, 91 M.S.P.R. 265, 268-69 (2002). If the appellant shows that his military status was a motivating or substantial factor in the agency action, the agency then has the opportunity come forward with evidence to prove, by a preponderance of the evidence, that it would have taken the adverse action anyway, for a valid reason. *See id.* at 269.

In response to my September 9, 2003 order, the appellant stated that "[his] proof is based primarily of indirect evidence." RAF, Tab 9, appellant's "USERRA Appeal" at 1. However, the appellant adduced no evidence showing that his military service was a substantial or motivating factor in the agency's decision not to

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[2] Preponderance of the evidence is defined at 5 C.F.R. § 1201.56(c)(2) as the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

select him for the position in question. Nor may discriminatory motivation be reasonably inferred under the circumstances. Instead, the record shows that: The appellant was rated ineligible for the position solely because his application lacked details of his experience; all of the individuals on the Certificate of Eligibles for the position were veterans; and the person ultimately selected for the position was, like the appellant, a 10-point preference-eligible veteran with a compensable service-connected disability. *See* RAF, Tab 9, Enclosure II, Subtabs 4, 5, 8, 9, 10; UAF, Tab 11, Subtabs 4C, 4G.

As part of his response, the appellant also asked that I review pursuant to 5 C.F.R. part 1203 the agency's allegedly invalid implementation of certain regulations issued by the Office of Personnel Management (OPM) and that I join that review with his USERRA complaint. *See* RAF, Tab 9, Enclosure I. Such discretionary reviews may, upon a petitioner's request, be performed by the full Board under the original jurisdiction granted it by 5 U.S.C. § 1204(f). I consequently lack the authority to perform such a review.

Accordingly, the appellant's request for relief under USERRA must be denied.[3] My previous findings and

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[3] A hearing may be provided to the appellant in a USERRA appeal once the Board's jurisdiction over the appeal is established. *See* 5 C.F.R. § 1208.13(b). Where, as here, discretion to grant a hearing exists, the Board has stated that the administrative judge should expressly rule on whether the appellant has demonstrated the existence of evidence involving the credibility of the parties involved, entitling the appellant to a hearing, or whether the matter can be resolved on the

conclusions regarding the dismissal of the appellant's VEOA appeal are hereby incorporated by reference. *See Kirkendall*, slip op. at 3-4.

DECISION

The appellant's request for relief is DENIED.

FOR THE BOARD: /s/ RAPHAEL BEN-AMI
RAPHAEL BEN-AMI
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on [JAN - 8 2004], unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

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basis of the written record. *See Jordan v. U.S. Postal Service*, 90 M.S.P.R. 525, 530 (2002). The appellant failed to make such a demonstration here, and I therefore decided this appeal based on the parties' documentary submissions.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), or personal or commercial delivery. A petition for review may also be filed by electronic mail (e-mail) if the petitioning party makes an election under 5 C.F.R. § 1201.5(f), which requires a written statement of the election that includes the e-mail address at which the party agrees to receive service. Such an election may be filed by e-mail at the following address: e-FilingHQ@mspb.gov.

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. The date of filing by mail is determined by the postmark date. The date of filing by fax or e-mail is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and

returned to you if you fail to provide a statement of how you served your petition on the other party. If the petition is filed by e-mail, and the other party has elected e-Filing, including the party in the address portion of the e-mail constitutes a certificate of service.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

You may not file your petition with the Court before this decision becomes final. To be timely, your petition must be *received* by the court no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

APPENDIX F

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBERS:
AT-3443-02-0622-I-1
AT-0330-02-0621-I-1

JOHN E. KIRKENDALL, APPELLANT

v.

DEPARTMENT OF THE ARMY, AGENCY

DATE: [Aug. 29, 2003]

OPINION AND ORDER

John E. Kirkendall, Inverness, Florida, pro se.

Deborah Davis, Esquire, Fort Bragg, North Carolina, for the agency.

BEFORE

Susanne T. Marshall, Chairman
Neil A. A. McPhie, Member

¶ 1 The appellant petitions for review of the initial decision that dismissed his claims under the Veterans Employment Opportunities Act (VEOA) of 1998, 5 U.S.C. § 3330a, and Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994,

codified as amended at 38 U.S.C. §§ 4301-4333 (1994 & Supp. II 1996). We find that, with regard to the appellant's VEOA claim, the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we AFFIRM the portion of the initial decision dealing with that claim. For the reasons set forth below, however, we GRANT the petition for review with regard to the USERRA claim, REVERSE the initial decision insofar as it dismissed the USERRA claim for lack of jurisdiction, and REMAND the matter to the regional office for further proceedings on the USERRA claim.

BACKGROUND

¶ 2 On June 13, 2002, the appellant filed appeals under USERRA and VEOA from the agency's decision finding him not qualified for a position at Fort Bragg, North Carolina. Specifically, the appellant, a 10-point preference-eligible veteran, applied for the position of Supervisory Equipment Specialist (Aircraft), GS-12. USERRA Appeal File, No. AT-3443-02-0622-I-1 (UAF), Tab 11(4E). The agency notified the appellant that his application lacked details of his experience and that he had been rated ineligible for the position. UAF, Tab 11(4G). On April 29, 2000, the appellant filed a formal complaint of discrimination with the agency. He asserted that he was not afforded veterans' preference in the hiring process and that his disability was improperly relied upon to disqualify him from consideration for the position. *Id.* The appellant also filed a complaint with the Department of Labor (DoL) claiming a violation of his veterans' preference rights. DoL notified the appellant that his complaint was untimely because it was not filed within the statutory 60-day filing deadline from the date of the alleged veterans' preference violation.

UAF, Tab 1. DoL advised the appellant that he could file a Board appeal within 15 days of his receipt of DoL's November 29, 2001 letter. *Id.*

¶ 3 On appeal, the administrative judge (AJ) dismissed the appellant's VEOA appeal for lack of jurisdiction, finding that the DoL rejected the appellant's complaint as untimely without addressing its substance, and that the appellant conceded that his VEOA complaint to DoL was untimely. Initial Decision (ID) at 3. In the alternative, the AJ found that, because the appellant did not file his appeal until June 13, 2002, long after DoL's November 29, 2001 notification letter and VEOA's 15-day deadline for filing a Board appeal, the appeal must be dismissed because the deadline cannot be waived. The AJ found that, with regard to the appellant's USERRA claim, the appellant's complaint did not constitute a cognizable claim under USERRA because he failed to allege that he was denied a benefit of employment on the basis of his previous performance of military duty. The AJ denied the appellant's request for a hearing.

ANALYSIS

¶ 4 The Board has jurisdiction over USERRA claims under 38 U.S.C. § 4324. *See* 5 C.F.R. § 1201.3(a)(22). As the court of Appeals for the Federal Circuit found in *Sheehan v. Department of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001), "the USERRA prohibits discrimination in employment on the basis of military service." The relevant provision states:

> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment,

> reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

38 U.S.C. § 4311(a). Under this provision, an appellant's claim that he was denied initial employment based on his status as a disabled veteran is cognizable. *Slentz v. U.S. Postal Service*, 92 M.S.P.R. 144, ¶ 8 (2002); *Bagunas v. U.S. Postal Service*, 92 M.S.P.R. 5, ¶¶ 17, 18 (2002); *cf. McBride v. U.S. Postal Service*, 78 M.S.P.R. 411, 415 (1998) (allegation of disability discrimination alone does not raise a USERRA claim).

¶ 5 The appellant in this case specifically asserted in his petition for appeal that the agency's employment process "discriminates against all disabled veterans 30% or more disabled." UAF, Tab 1. He also asserted that he is a 100% disabled veteran, that his resume included this information, that his application packet included a letter from the Department of Veterans Affairs advising the agency of his disability status, and that he was the only 100% disabled applicant for the position. The appellant asserted further that the agency failed to comply with the "legal obligations" to him as a 30% or more disabled veteran. UAF, Tab 1. In addition, the appellant claimed that he is rated as more than 30% disabled (as a result of a service connected cerebral hemorrhage that caused left hemiparesis with secondary conditions including dementia), and argued that the agency violated "USERRA and the Rehabilitation Act" by not selecting him for the position based on his military service and his service-connected disability. UAF, Tab 1.

¶ 6 Although the AJ found that the appellant did not allege a cognizable claim under USERRA because he did not allege that he was denied a benefit of employment on the basis of his previous performance of military duty, ID at 5-6, we find that the appellant's repeated assertions that he was not selected for the position based on his status as a disabled veteran was indeed a claim that can proceed under USERRA. *See Bagunas*, 92 M.S.P.R. 5, ¶ 18; cf. *McBride*, 78 M.S.P.R. 411, 415 (1998) (allegation of disability discrimination alone does not raise a USERRA claim).

¶ 7 Furthermore, even though the record before us is void of the necessary evidence to support this claim, the relative weakness of factual allegations in support of a USERRA claim is not a ground for dismissing the claim summarily; instead the claim should be denied on the merits if the appellant fails to develop those allegations. *Bagunas*, 92 M.S.P.R. 5, ¶ 18. Because the AJ only advised the appellant that an allegation of disability discrimination does not raise a USERRA claim, and did not advise him that a claim of non-selection based on his status as a "disabled veteran" is cognizable under USERRA, the appellant may have been hindered in understanding what was necessary to set forth his USERRA claim clearly. Accordingly, because the appellant did not have the full opportunity to develop his USERRA claim, we find it necessary to remand this case to the regional office for further proceedings on his USERRA claim.

ORDER

¶ 8 We REMAND this appeal to the regional office for further proceedings and the issuance of a new initial decision on the appellant's USERRA claim. The AJ shall advise the parties of the different methods of proving a USERRA claim, and explain the USERRA burdens of proof. *See Matz v. Department of Veterans Affairs*, 91 M.S.P.R. 265, ¶¶ 9, 16 (2002). The AJ shall provide the parties a further opportunity to conduct discovery. Although the AJ has the discretion under *Jordan v. U.S. Postal Service*, 90 M.S.P.R. 525, ¶ 9 (2002), to determine whether to grant the appellant's request for a hearing, the AJ should expressly rule on whether the appellant has demonstrated the existence of evidence involving the credibility of the parties involved, entitling the appellant to a hearing, or whether the matter can be decided on the basis of the written record. *Id.* The new initial decision should incorporate by reference the previous finding and conclusions on the VEOA claim so that the Appellant has a single decision addressing both claims.

FOR THE BOARD: /s/ MATTHEW SHANN
MATTHEW SHANN
[for] Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.

APPENDIX G

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

DOCKET NUMBERS[1]:
AT-3443-02-0622-I-1
AT-0330-02-0621-I-1

JOHN E. KIRKENDALL, APPELLANT

v.

DEPARTMENT OF THE ARMY, AGENCY

DATE: Sept. 20, 2002

INITIAL DECISION

John E. Kirkendall, Inverness, Florida, pro se.

Deborah Davis, Esquire, Fort Bragg, North Carolina, for the agency.

BEFORE

Raphael Ben-Ami
Administrative Judge

---

[1] I have joined these appeals because they contain similar issues and joinder will expedite processing of the cases without adversely affecting the interest of either party. *See* 5 C.F.R. § 1201.36.

The appellant filed appeals under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans Employment opportunities Act (VEOA) from the agency's decision finding him not qualified for a position at Fort Bragg, North Carolina. For the following reasons, these appeals are DISMISSED.

BACKGROUND

In December of 1999, the appellant, a 10-point preference-eligible veteran, applied for the position of Supervisory Equipment Specialist (Aircraft), GS-1670-12, with the Department of the Army in Fort Bragg, North Carolina. *See* USERRA Appeal File (UAF), Tab 11, Subtab 4E. By memorandum dated January 5, 2000, the agency informed the appellant that he was rated ineligible for the position because his application lacked details of his experience. *See id.*, Subtab 4G. The appellant filed a formal complaint of discrimination with the agency on April 29, 2000, claiming that he was not afforded veterans' preference in the hiring process and that his disability was improperly relied upon to disqualify him from consideration for the position in question. *See id.*, Subtab 4D. The appellant also filed a complaint with the Department of Labor (DoL), claiming a violation of his veterans' preference rights. By letter dated November 29, 2001, DoL advised the appellant that his complaint was untimely because it was not filed within 60 days of the alleged veterans' preference violation, as required by statute. *See* UAF, Tab 1. The appellant was further advised that he could file an appeal with the Board within 15 days of his receipt of DoL's November 29 letter. *See id.*

The appellant filed these appeals on June 13, 2002 (*see* 5 C.F.R. § 1201.4(*l*), the date of filing by mail is determined by the postmark date), claiming, among other things, that his veterans' preference rights were violated and that the agency's decision finding him not qualified for the position in question constitutes a violation of USERRA. *See* VEOA Appeal File, Tab 1.

JURISDICTION

Legal standard/burden of proof

The Board's jurisdiction is not plenary, but is limited to those areas specifically granted by some law, rule, or regulation. *See* 5 U.S.C. § 7701(a); *Todd v. Merit Systems Protection Board*, 55 F.3d 1574, 1576 (Fed. Cir. 1995). Thus, the Board does not have jurisdiction over all actions that are alleged to be incorrect. *See, e.g., Weyman v. Department of Justice*, 58 M.S.P.R. 509, 512 (1993).

The appellant bears the burden of establishing by preponderant evidence that the Board has jurisdiction over his appeals. *See* 5 C.F.R. § 1201.56(a)(2). Preponderance of the evidence is defined by regulation as the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. *See* 5 C.F.R. § 1201.56(c)(2).

The Board lacks jurisdiction over the appellant's VEOA appeal.

The VEOA provides that a preference eligible who believes that an agency has violated his rights "under any statute or regulation relating to veterans' preference may file a complaint with the Secretary of La-

bor." *Bagunas v. U.S. Postal Service*, 92 M.S.P.R. 5, 9 (2002) (citing 5 U.S.C. § 3330a(a)(1)). Such a complaint "must be filed within 60 days after the date of the alleged violation." *Id.* (citing 5 U.S.C. § 3330a(a)(2)(A)). The "complainant may elect to appeal the alleged violation" to the Board no later than 15 days from the date the complainant receives written notification from DoL of the results of its investigation. *Id.* (citing 5 U.S.C. § 3330a(d)(1)). Exhaustion of the DoL complaint process is a jurisdictional prerequisite to pursuit of a Board appeal under the VEOA. *Id.* (citing *Augustine v. Department of Veterans Affairs*, 88 M.S.P.R. 407, ¶ 7 (2001); *Sherwood v. Department of Veterans Affairs*, 88 M.S.P.R. 208, ¶ 5 (2001)). The Board cannot exercise jurisdiction over a claim that an agency violated an individual's veterans' preference rights if that individual did not first file a complaint with DoL. *Id.* (citing *Tindall v. Department of the Army*, 84 M.S.P.R. 230, ¶ 5 (1999)). An appellant fails to exhaust his remedy before DoL where DoL rejects his complaint as untimely with no consideration of its substance. *See id.* at 10.

As noted above, DoL rejected the appellant's complaint as untimely without addressing its substance. Further, the appellant does not deny that his complaint to DoL was filed after the time limit set by statute. When the appellant concedes that his VEOA complaint to DoL was untimely and DoL disposes of that complaint as untimely without addressing its substance, the Board cannot exercise jurisdiction over that individual's subsequent VEOA appeal concerning the same alleged violation of veterans' preference rights. *Bagunas*, 92 M.S.P.R. at 10. In addition, where, as here, DoL rejects a VEOA complaint as untimely, the Board has no

authority to decide whether DoL should have waived the deadline. *Id.* at 11. Finally, even assuming for the sake of argument that the appellant's VEOA appeal is within the Board's jurisdiction, his appeal was not filed with the Board until June 13, 2002, long after he received DoL's November 29, 2001 notification, and VEOA's 15-day deadline for filing an appeal cannot be waived and an appeal filed beyond that deadline must be dismissed. *Id.* at 9 (citing *Williams* v. *Department of the Navy*, 90 M.S.P.R. 669 (2002)).

The appellant has failed to raise a cognizable claim under USERRA.

Under USERRA, the Board has appellate jurisdiction over appeals of any person alleging discrimination in a Federal employment on account of prior military service. *Bagunas*, 92 M.S.P.R. at 12 (citing 38 U.S.C. §§ 4303(4)(A)(ii), 4311(a), 4324(b)). The requirements for establishing Board jurisdiction under USERRA are: (1) Performance of duty in a uniformed service of the United States; (2) an allegation of a loss of a benefit of employment; and (3) an allegation that the benefit was lost due to the performance of duty in the uniformed service. *See Yates v. Merit Systems Protection Board*, 145 F.3d 1480 (Fed. Cir. 1998).

The appellant claims that the agency "denied [him] the right to qualify by denying [his] veteran's rights established under law." UAF, Tab 1, page 5 of appellant's narrative attached to Board Appeal Form. The appellant further claims that "[t]his establishes [his] claim of discrimination based on handicap and [his] status as a veteran, because only 30% or more preferential applicants can exercise this right." *Id.* In addition,

"[the appellant] contend[s] that if it were not for [his] military experience which [he] was not given credit for in the evaluation process [he] was qualified," and "[his] military experience was disregarded in considering [his] qualifications." *Id.* at page 10.

The appellant did not allege that he was denied a benefit of employment due to his performance of military duty and provided no evidence with his appeal showing that he performed duty in a uniformed service. Thus, because it did not appear that the appellant had raised a cognizable claim under USERRA, I issued an Order to Show Cause, advising the appellant of his burden of proof and explaining that he could make out a prima facie case of discrimination under USERRA if he alleged facts that, if proven, could establish that he was found not qualified for the position for which he applied at Fort Bragg because of his prior military service. *See* UAF, Tab 8. I further advised the appellant that although USERRA proscribes, among other things, the denial of initial employment based on a veteran's performance of military duty, it does not proscribe the denial of initial employment based on a disability arising from that duty. *See McBride v. U.S. Postal Service*, 78 M.S.P.R. 411, 415 (1998). In addition, I explained that the Board's jurisdiction under USERRA does not extend beyond the complained-of discrimination because of military status, does not allow for a decision on the merits of the underlying matter except to the extent necessary to address the appellant's military status claims, and thus does not include a review of other claims of prohibited discrimination. *See Metzenbaum v. Department of Justice*, 89 M.S.P.R. 285, 291-92 (2001).

The appellant thereafter provided evidence showing that he performed duty in a uniformed service. *See* UAF, Tab 9. The appellant also timely responded to the show-cause order, reiterating his contention that the agency failed to property credit his military service in assessing his qualifications for the position in question. *See id.*, Tab 10.

I find that the appellant's complaint does not constitute a cognizable claim under USERRA because he has not alleged that he was denied a benefit of employment on the basis of his previous performance of military duty. Rather, the appellant alleges that he was found unqualified for the position because the agency ignored his military experience. Further, the appellant does not allege that individuals lacking military experience were rated eligible for the position. Indeed, the individual ultimately selected for the position was, like the appellant, a 10-point preference-eligible veteran with a compensable service-connected disability. *See* UAF, Tab 11, Subtab 4C. Nor has the appellant raised any other claim which might invoke the Board's jurisdiction.[2] Accordingly, these appeals must be dismissed.

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[2] I therefore did not provide the appellant his requested hearing in these appeals. *See* 5 C.F.R. §§ 1208.13(b), 1208.23(b) (a hearing may be provided to the appellant in a USERRA appeal once the Board's jurisdiction over the appeal is established and, in a VEOA appeal, once the Board's jurisdiction over the appeal has been established and it has been determined that the appeal is timely).

DECISION

The appeals are DISMISSED.

FOR THE BOARD: /s/ RAPHAEL BEN-AMI
RAPHAEL BEN-AMI
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become in final on [Oct. 25, 2002], unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anyting to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be *received* by the court no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

APPENDIX H

U.S. Department of Labor [Seal Omitted]

727-893-2415
fax 727-893-2981

Office of the Assistant Secretary for
Veterans' Employment and Training

Veterans Employment and Training Service
P.O. Box 12528
St. Petersburg, FL 33733

Nov. 29, 2001

Mr. John E. Kirkendall
P.O. Box 273
Floral City, FL 34436

RE:04-FL-2002-3-10-VP

Dr. Mr. Kirkendall:

This letter is in response to the package you sent in reference to the Veterans Employment Opportunity Act of 1998 (VEO). The act's intent was to transfers the investigative authority for veterans' preference in Federal employment from the OPM to the Veterans Employment and Training Service (VETS).

According to Public Law 105-339, sec. 3330a(2)(A), A complaint under this subsection must be filed within 60 days after the date of the alleged violation. It has been determined that the alleged violation occurred more than 60 days from the filing of this case. Therefore, you have the right to take your claim to

the Merit Staffing Protection Board (MSPB), that claim must be filed *within 15 days* of the date following the receipt of this notification. If you chose to do so, notify this office, in writing of your intent. If you so elect, please use the enclosed Appeal Form 283.

Merit Systems Protection Board
401 W. Peachtree Street. Swt. 1050
Atlanta, GA 30308

If you have any additional questions, please feel free to contact me at the above telephone number.

Sincerely,

/s/ ILLEGIBLE
Craig K. Spry
Assistant Director

encl.

APPEAL FORM

INSTRUCTIONS

GENERAL: You do not have to use this form to file an appeal with the Board. However, if you do not, your appeal must still comply with the Board's regulations. 5 C.F.R. Parts 1201 and 1209. Your agency's personnel office will give you access to the regulations, and the Board will expect you to be familiar with them. You also should become familiar with the Board's key case law and controlling court decisions as they may affect your case. **You must tell the Board if you are raising an affirmative defense** (see Part IV), and **you are responsible for proving each defense you raise.**

WHERE TO FILE AN APPEAL: You must file your appeal with the Board's regional or field office which has responsibility for the geographic area in which you are employed. See 5 C.F.R. Part 1201, Appendix II.

WHEN TO FILE AN APPEAL: Your appeal must be filed during the period beginning with the day after the effective date of the action you are appealing and ending on the 30th day after the effective date. You may not file your appeal before the effective date of the action you are appealing. If you are appealing from a decision which does not set an effective date, you must file within 35 days of the date of the decision you are appealing. If your appeal date your is late, it may be dismissed as untimely. The date of the filing is the appeal is postmarked, the date of the facsimile transmission, the date it is delivered to a commercial overnight delivery service, or the date of receipt if you personally deliver it to the regional or field office.

HOW TO FILE AN APPEAL: You may file your appeal by mail, by facsimile, by commercial overnight delivery, or by personal delivery. You must submit two copies of both your appeal **and** all attachments. You may supplement your response to any question on separate sheets of paper, but if you do, please put your name and address at the top of each additional page. All of your submissions must be legible and on 8 1/2" x 11" paper. **Your appeal must contain your or your representative's signature in block 6. If it does not, your appeal will be rejected and returned to you. If your representative signs block 6, you must sign block 11 or submit a separate written designation of representative.**

WHISTLEBLOWING APPEAL/STAY REQUEST: If you believe the action you are appealing was threatened, proposed, taken, or not taken because of whistleblowing activities, **you must complete Part VII of this form. If you are requesting a stay, you must complete Part VIII of this form.**

Privacy Act Statement: *This form requests personal information which is relevant and necessary to reach a decision in your appeal. The U.S. Merit Systems Protection Board collects this information in order to process appeals under its statutory and regulatory authority. Since your appeal is a voluntary action you are not required to provide any personal information in connection with it. However, failure to supply the U.S. Merit Systems Protection Board with all the information essential to reach a decision in your case could result in the rejection of your appeal.*

The U.S. Merit Systems Protection Board is authorized under provisions of Executive Order 9397, dated November 22, 1943, to request your Social Security number, but providing your Social Security number is voluntary and failure to provide it will not result in the rejection of your appeal. Your Social Security number will only be used for identification purposes in the processing of your appeal.

You should know that the decisions of the U.S. Merit Systems Protection Board on appeals are final administrative decisions and, as such, are available to the public under the provisions of the Freedom of Information Act. Additionally, it is possible that information contained in your appeal file may be released as required by the Freedom of Information Act. Some information about your appeal will also be used in depersonalized form as a data base for program statistics.

Public Reporting Burden: *The public reporting burden for this collection of information is estimated to vary from 20 minutes to 1 hour, with an average of 30 minutes per response, including time for reviewing the form, searching existing data sources, gathering the data necessary, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of the collection of information, including suggestions for reducing this burden, to the Office of Planning and Resource Management Services, Merit Systems Protection Board, 1120 Vermont Ave., NW., Washington, DC 20419.*

Part I Appellant Identification

1. Name *(last, first, middle initial)*	2. Social Security Number
Kirkendall, John E.	262-39-3532
3. Present address *(number and street, city, state, and ZIP code)* **You must notify the Board of any change of address or telephone number while the appeal is pending with the MSPB.**	4. Home phone *(include area code)*
3375 E. Shands CT Inverness, Florida 34452	352-726-8613
	5. Office phone *(include area code)*
	N/A

6. I certify that all of the statements made in this appeal are true, complete, and correct to the best of my knowledge and belief	**Signature of appellant or designated representative**	Date signed
	/s/	8 May 02

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APPENDIX J

STATUTORY PROVISION INVOLVED

Section 3330a of Title 5 of the United States Code provides:

Preference eligibles; administrative redress

(a)(1) A preference eligible who alleges that an agency has violated such individual's rights under any statute or regulation relating to veterans' preference may file a complaint with the Secretary of Labor.

(2)(A) A complaint under this subsection must be filed within 60 days after the date of the alleged violation.

(B) Such complaint shall be in writing, be in such form as the Secretary may prescribe, specify the agency against which the complaint is filed, and contain a summary of the allegations that form the basis for the complaint.

(3) The Secretary shall, upon request, provide technical assistance to a potential complainant with respect to a complaint under this subsection.

(b)(1) The Secretary of Labor shall investigate each complaint under subsection (a).

(2) In carrying out any investigation under this subsection, the Secretary's duly authorized representatives shall, at all reasonable times, have reasonable access to, for purposes of examination, and the right to copy and receive, any documents of any

person or agency that the Secretary considers relevant to the investigation.

(3) In carrying out any investigation under this subsection, the Secretary may require by subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation. In case of disobedience of the subpoena or contumacy and on request of the Secretary, the Attorney General may apply to any district court of the United States in whose jurisdiction such disobedience or contumacy occurs for an order enforcing the subpoena.

(4) Upon application, the district courts of the United States shall have jurisdiction to issue writs commanding any person or agency to comply with the subpoena of the Secretary or to comply with any order of the Secretary made pursuant to a lawful investigation under this subsection and the district courts shall have jurisdiction to punish failure to obey a subpoena or other lawful order of the Secretary as a contempt of court.

(c)(1)(A) If the Secretary of Labor determines as a result of an investigation under subsection (b) that the action alleged in a complaint under subsection (a) occurred, the Secretary shall attempt to resolve the complaint by making reasonable efforts to ensure that the agency specified in the complaint complies with applicable provisions of statute or regulation relating to veterans' preference.

(B) The Secretary of Labor shall make determinations referred to in subparagraph (A) based on a preponderance of the evidence.

(2) If the efforts of the Secretary under subsection (b) with respect to a complaint under subsection (a) do not result in the resolution of the complaint, the Secretary shall notify the person who submitted the complaint, in writing, of the results of the Secretary's investigation under subsection (b).

(d)(1) If the Secretary of Labor is unable to resolve a complaint under subsection (a) within 60 days after the date on which it is filed, the complainant may elect to appeal the alleged violation to the Merit Systems Protection Board in accordance with such procedures as the Merit Systems Protection Board shall prescribe, except that in no event may any such appeal be brought—

(A) before the 61st day after the date on which the complaint is filed; or

(B) later than 15 days after the date on which the complainant receives written notification from the Secretary under subsection (c)(2).

(2) An appeal under this subsection may not be brought unless—

(A) the complainant first provides written notification to the Secretary of such complainant's intention to bring such appeal; and

(B) appropriate evidence of compliance with subparagraph (A) is included (in such form and manner as the Merit Systems Protection Board may prescribe) with the notice of appeal under this subsection.

(3) Upon receiving notification under paragraph (2)(A), the Secretary shall not continue to investigate or further attempt to resolve the complaint to which the notification relates.

(e)(1) This section shall not be construed to prohibit a preference eligible from appealing directly to the Merit Systems Protection Board from any action which is appealable to the Board under any other law, rule, or regulation, in lieu of administrative redress under this section.

(2) A preference eligible may not pursue redress for an alleged violation described in subsection (a) under this section at the same time the preference eligible pursues redress for such violation under any other law, rule, or regulation.

65

(2)

No. 07-19

IN THE

Supreme Court of the United States

DEPARTMENT OF THE ARMY,

Petitioner,

v.

JOHN E. KIRKENDALL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF IN OPPOSITION

Theodore B. Olson
Counsel of Record
Miguel A. Estrada
Henry C. Whitaker
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Respondent

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QUESTION PRESENTED

In *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), this Court held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96. Eight years later, Congress enacted the Veterans Employment Opportunities Act of 1998 (VEOA), which provides a mechanism for veterans to vindicate their veterans-preference rights in suits against the federal government. The question presented is:

May the 15-day period for a veteran to file a VEOA lawsuit in the Merit Systems Protection Board be equitably tolled in at least some cases?

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BRIEF IN OPPOSITION

Respondent John E. Kirkendall respectfully opposes the United States' petition for a writ of certiorari.

INTRODUCTION

While this Nation's military fights simultaneous wars in Iraq and Afghanistan, the United States asks this Court to hold that Congress clearly forbade *all* of this Nation's veterans in *all* cases from obtaining equitable tolling of the 15-day period for filing a veterans-preference claim in the Merit Systems Protection Board. But the en banc Federal Circuit, which is expert in these matters, reached a contrary judgment via a garden-variety, careful, and entirely correct application of the multi-factor, context-sensitive test mandated by this Court's equitable tolling precedents—principally *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). The decision below is limited to the distinctive statutory scheme at issue, is interlocutory, and implicates no circuit conflict. It does not merit this Court's review.

Unable to show why this Court should grant plenary review, the government contends that the Court should grant, vacate, and remand (GVR) in light of *Bowles v. Russell*, 127 S. Ct. 2360 (2007). But a GVR is wholly inappropriate in this case. The Federal Circuit's judgment rests on this Court's settled equitable tolling precedents—decisions that *Bowles* did not so much as mention, let alone overrule. *Bowles* simply reaffirmed the longstanding rule that the time within which to appeal an *Article III district court's* decision is "mandatory and jurisdictional." This case, by contrast, involves the time for transferring an adjudication from one *administrative body* to

another. The Federal Circuit was fully aware of the rule that the time to appeal a district court's decision is jurisdictional, but squarely rejected the relevance of that rule in this case. There is no reasonable probability it would change that conclusion were this case remanded for further consideration in light of *Bowles*.

In any event, even were *Bowles* arguably relevant to the Federal Circuit's ruling, this Court should still not GVR in light of *Bowles*. The Federal Circuit remanded this case to the Board both so that Mr. Kirkendall could demonstrate that he is entitled to equitable tolling on his Veterans Employment Opportunities Act of 1998 (VEOA) claim, and for Mr. Kirkendall to have the hearing on his separate Uniformed Services Employment and Reemployment Rights Act (USERRA) claim to which he is entitled. At the conclusion of those proceedings, the Federal Circuit would have ample opportunity to reconsider its equitable tolling holding in light of *Bowles* should Mr. Kirkendall prevail. A GVR in light of *Bowles* now, however, would gratuitously delay the hearing that the Board has, for years, denied Mr. Kirkendall on his USERRA claim. The Court should not exacerbate that delay.

The petition for a writ of certiorari should be denied.

STATEMENT

1. Congress enacted the VEOA, 5 U.S.C. § 3330a, "to assist veterans in obtaining gainful employment with the federal government and to provide a mechanism for enforcing this right." Pet. App. 18a. Congress intended the VEOA to simplify and streamline the remedial mechanism by which veterans may

enforce various preferences to which federal law entitles them, including preferential treatment in seeking federal employment. The VEOA, accordingly, "is an expression of gratitude by the federal government to the men and women who have risked their lives in defense of the United States." *Id.*

Under the VEOA, veterans who believe their veterans-preference rights have been violated by the United States government may file a complaint with the Department of Labor (DOL). *See* 5 U.S.C. § 3330a(a)(1)(A). Such a "complaint must be filed within 60 days after the date of the alleged violation." *Id.* § 3330a(a)(2)(A). If unsuccessful before the Secretary, the veteran may then challenge the government's employment determination in the Board, "except that in no event may any such appeal be brought . . . later than 15 days after the date on which the complainant receives written notification from the Secretary." *Id.* § 3330a(d)(1).

2. Respondent John E. Kirkendall is a 100% disabled veteran who suffers from organic brain syndrome. Pet. App. 2a. Mr. Kirkendall joined the United States Army in 1982, and was posted to South Korea in 1984 and 1985. Govt. C.A. App. 50. After his service overseas, he served as Commander of a Direct Support Platoon at Fort Bragg, North Carolina, and as a Force Integration Officer and an Executive Officer/Commander at Fort Bliss, Texas. *Id.* at 39-40, 49-52. He was honorably discharged from the Army in 1990, having achieved the rank of Captain. His disability arises from a cerebral hemorrhage that occurred during his service in the Army, and has resulted in the paralysis of the left side of his body. *Id.* at 67.

In 1999, Mr. Kirkendall applied for a position as a Supervisory Equipment Specialist (Aircraft) with the Army at Fort Bragg. His service and resulting disability entitled him to a 10-point veterans preference under federal law. Pet. App. 2a. In support of his application, Mr. Kirkendall submitted a two-page resume noting his experience in aviation maintenance. Govt. C.A. App. 39-40. The resume detailed, for example, that Mr. Kirkendall had held a job at Fort Bragg virtually identical to the position offered; in that job he had supervised 30 enlisted men and women and five officers. *Id.* at 39. He also submitted an evaluation from his supervisor, who stated that "Captain Kirkendall is an extremely talented officer who possesses superb skills" and recommended that he "be promoted to Major and command an aviation maintenance unit." *Id.* at 42.

In January 2000, the Army informed Mr. Kirkendall in writing that it had rated him "Ineligible" for the position purportedly because his application lacked "details of [his] experience relating to [the offered] position." *Id.* at 46. Mr. Kirkendall requested reconsideration. *Id.* at 47. The regional employment office advised him in writing to "[e]xpand on [his] duties as Aviation Maintenance Chief" and more fully discuss his experience and responsibilities. *Id.* at 48. Mr. Kirkendall submitted a revised four-page resume that incorporated these suggestions. *Id.* at 49-52.

The Army again rated Mr. Kirkendall "Ineligible," once again asserting a lack of detail in his application. *Id.* at 56. A follow-up letter sent by an Army official stated that Mr. Kirkendall's resume was deficient because "[t]he duties reflected under each job title were indescriptive and inconclusive in describing how the tasks were actually performed/executed in relation to the duties required by

this position." *Id.* at 57. Mr. Kirkendall e-mailed the director of the regional employment office, asking why he had been rated "Ineligible" in light of his expanded resume. *Id.* at 58, 64. In an e-mail response, the director admitted that Kirkendall "most likely [has] the necessary qualifications for the position in question." *Id.* at 65. The director did not indicate that Kirkendall's resume insufficiently detailed the duties performed in each prior job, but noted that the resume was deficient because it should have included the starting and ending months for the various jobs—not just the years. *Id.* The director identified no other reason for the "Ineligible" rating. Another candidate, a 30% disabled veteran, was selected for the position. Pet. App. 3a.

3. Proceeding *pro se*, Mr. Kirkendall filed a complaint with the DOL, alleging that the Army had violated his veterans-preference rights under the VEOA. Govt. C.A. App. 5. The DOL advised him that his complaint was untimely because it was not filed within 60 days of the alleged VEOA violation, as required by 5 U.S.C. § 3330a(a)(2)(A). Pet. App. 140a-141a.

On June 13, 2002, Mr. Kirkendall sought review of the Army's refusal to hire him in the Merit Systems Protection Board. Mr. Kirkendall renewed his VEOA claim, and also separately contended that the Army had unlawfully discriminated against him in violation of USERRA. An administrative judge dismissed Mr. Kirkendall's VEOA claim as untimely and also dismissed his USERRA claim. *Id.* at 133a-134a. The full Board eventually affirmed that decision.

4. Still proceeding *pro se*, Mr. Kirkendall sought review in the Federal Circuit. A divided panel of

that court reversed the Board's decision. *Id.* at 89a. The majority held that the 60-day time period set forth in 5 U.S.C. § 3330a(a)(2)(A), and the 15-day time period set forth in 5 U.S.C. § 3330a(d)(1)(B), were both subject to equitable tolling under the standard established in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). The panel also held that Mr. Kirkendall was entitled to a hearing on his separate USERRA claim. It thus remanded the case to the agency "to assess whether Kirkendall's disability prevented him from complying with the filing requirements," *id.* at 97a, and for the Board to hold a hearing on his USERRA claim. Judge Dyk dissented from both rulings.

5. The Federal Circuit granted the government's request for rehearing en banc, and appointed the undersigned *pro bono* counsel for Mr. Kirkendall. *Id.* at 86a-87a. The en banc panel agreed with the panel's holding in both respects, ruling not only that the time limits in the VEOA were amenable to equitable tolling, but also that Mr. Kirkendall is entitled to a hearing on his USERRA claim. *Id.* at 2a.

The court rested its equitable tolling holding on the framework articulated in *Irwin*. The court reasoned that "Kirkendall's VEOA claim is sufficiently analogous to private actions brought under Title VII of the Civil Rights Act of 1964 . . . to invoke the presumption that equitable tolling applies here." *Id.* at 8a-9a. Applying the *Irwin* presumption, the court considered in detail the purpose, structure, and language of the VEOA, and concluded that it contained no "clear or emphatic evidence of Congress' intent to foreclose equitable tolling under section 3330a(d)(1)(B)." *Id.* at 10a; *see also id.* at 9a-18a. Judge Gajarsa concurred separately to provide addi-

tional reasons supporting the court's equitable-tolling ruling. *Id.* at 29a-43a.

Judge Moore concurred in part and dissented in part. She agreed with the en banc majority that the *Irwin* presumption applied to the VEOA. But Judge Moore argued that Congress had clearly rebutted that presumption by, among other things, including the words "in no event" in the statutory text. *See id.* at 43a, 46a-48a. Judge Moore agreed, however, that Mr. Kirkendall was entitled to a hearing on his USERRA claim. *Id.* at 58a-62a. Judge Bryson also dissented, expressing the view that Mr. Kirkendall was not (contrary to the majority's ruling) entitled to a hearing on his USERRA claim. *Id.* at 63a-80a. Judge Dyk, writing only for himself, dissented separately. *Id.* at 80a-85a.

REASONS FOR DENYING THE PETITION

I. The Federal Circuit's Decision Is Correct And Conflicts With No Decision Of This Court Or Any Other Court

The decision below is correct and conflicts with no decision of this Court or any other court of appeals. Indeed, the government scarcely even attempts to satisfy traditional certiorari criteria. The government's petition contends instead that Congress clearly forbade veterans from obtaining equitable tolling of the 15-day time period for bringing a VEOA case in the MSPB. Pet. 16-22. The Federal Circuit correctly rejected that argument.

A. The Federal Circuit correctly applied this Court's precedent on equitable tolling

In 1990, this Court clarified a drafting rule against which Congress has legislated ever since. Absent clear indication to the contrary, statutory time limits governing suits against the federal government—even those phrased in mandatory terms—may be equitably tolled in lawsuits that are arguably (though not necessarily precisely) analogous to a private lawsuit. *Irwin*, 498 U.S. at 95; *Scarborough v. Principi*, 541 U.S. 401, 422 (2004). Congress enacted the VEOA just eight years later, against the background of that settled presumption, and nothing in the VEOA rebuts it, much less clearly so.

The *Irwin* presumption of equitable tolling squarely governs the time limits in the VEOA. As the three-judge panel and 13-judge Federal Circuit en banc panel unanimously recognized, a VEOA suit in the MSPB is strikingly analogous to a private Title VII lawsuit in United States district court. Pet. App. 8a-9a (majority opinion); *id.* at 44a (Moore, J., concurring in part and dissenting in part); *id.* at 93a (panel majority); *id.* at 102a (Dyk, J., dissenting). Both Title VII and the VEOA vindicate employment rights against the federal government, and do so in parallel ways. As Judge Gajarsa pointed out, *id.* at 30a-31a, a Title VII private claimant, for example, must first file a complaint with the EEOC, and only then may file a private suit in federal district court. *See* 42 U.S.C. § 2000e-5(e), (f)(1). Equitable tolling applies to both of those deadlines. *Irwin*, 498 U.S. at 95. Like a Title VII claimant, a VEOA claimant must first file a complaint with the DOL, and if the

DOL is unable to resolve the complaint, then may bring an action in the MSPB.[1] Because that remedial structure is precisely analogous to the structure of Title VII, this Court should presume that the time limits in the VEOA may be equitably tolled just like the time limits in Title VII.

The Federal Circuit correctly ruled that nothing in the VEOA clearly rebuts that presumption. The factors this Court has previously employed to rebut the *Irwin* presumption do not apply to the time limits in the VEOA. For example, in *United States v. Brockamp*, 519 U.S. 347 (1997), this Court concluded that the statute of limitations for filing federal tax refund claims precluded equitable tolling. The Court found that this statute—which employed the word "shall," 519 U.S. at 350—"set[] forth its time limitations in unusually emphatic form," not because the statutory language was absolute, but rather because Congress gave a number of structural signals that tolling was precluded. *Id.* at 350-53. For example, the tax statute in *Brockamp* set forth the time period in a "highly detailed technical manner," repeated that time limit several times, and set forth explicit exceptions to the time limit. *Id.* at 350-51. The Court also emphasized the obvious administrative

[1] The government disputes this analogy between the VEOA and Title VII in a two-sentence footnote. "[T]he VEOA," the government says, "does not directly prohibit *discrimination* against veterans, but instead merely provides a mechanism for enforcement of veterans' *preference* rights." Pet. 17 n.5 (emphasis in original). But as the government recognizes, a "precise private analogue" is not required for the *Irwin* presumption to govern a suit against the government. *Id.* (quoting *Scarborough v. Principi*, 541 U.S. 401, 422 (2004)). The similarities between Title VII and the VEOA easily satisfy that lenient standard.

problems that would be caused by permitting equitable tolling for the hundreds of millions of tax-refunds claims filed each year. *Id.*

The Federal Circuit faithfully followed that analysis in this case. The 15-day time limit in the VEOA is not structured in "unusually emphatic" terms like the statute in *Brockamp*. Pet. App. 6a-23a. Section 3330a is miles away from being "detailed, technical, or repeated": like many limitations periods that are routinely held subject to tolling, the 15-day time limit in the VEOA is stated in straightforward, simple terms in a single subsection. *Id.* at 16a-17a. Section 3330a also contains no explicit exceptions that might suggest that Congress deliberately considered, yet rejected, equitable tolling. *Id.* at 17a.[2] The statute in addition is relatively short—far shorter than other statutes this Court has held to foreclose equitable tolling. *Id.* Finally, the Federal Circuit noted that the purpose of the VEOA's administrative scheme—which is "an expression of gratitude by the federal government to the men and women who have risked their lives in defense of the United States"—and the fact that many veterans proceed *pro se* both support permitting equitable tolling. *Id.* at 18a. Those features are all the more persuasive in this case, which is governed by the "canon that veterans' benefits statutes should be construed in the veteran's favor." *Id.* at 17a, 22a (citing, among other cases, *King v. St. Vincent's Hospital*, 502 U.S. 215, 220 n.9 (1991)). A straightforward application

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[2] The government did not contend below, and does not contend here, that permitting equitable tolling of the VEOA's time limits would create administrative problems comparable to permitting equitable tolling for the tax-return deadlines at issue in *Brockamp*.

of the factors this Court considered in *Brockamp* therefore shows that the time limits in the VEOA may be equitably tolled.

B. The VEOA's mandatory language is insufficient to rebut the *Irwin* presumption

The government barely discusses the multi-factor analysis that this Court conducted in *Brockamp* to establish that a statute emphatically precludes tolling. Instead, the United States attaches talismanic significance to the fact that the 15-day time limit is phrased in mandatory terms. Pet. 18-19. But the text of *all* time limits is mandatory; otherwise they would not be "limits." The government's "textual" theory would render *all* tolling doctrine nugatory. Indeed, *Irwin* made clear that mandatory language alone does not foreclose equitable tolling. When considered against the backdrop of the *Irwin* drafting rule, therefore, the government's heavy reliance on the categorical language in the VEOA is utterly misplaced.

This Court has repeatedly held that "a time limit may be phrased in seemingly categorical terms but still be subject to equitable tolling." Br. for the United States as *Amicus Curiae* Supporting Resp't, *Bowles v. Russell*, 127 S. Ct. 2360 (2007). The examples are legion. In *Irwin* itself, this Court explained that a statute providing that "[e]very claim . . . *shall be barred* unless the petition . . . is filed within six years," did not clearly indicate that Congress intended every such action to be barred within the time period. 498 U.S. at 95 (emphasis added and quotation marks omitted). In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), this Court like-

wise held that the time limit on filing a Title VII charge with the EEOC—which provided the charge "*shall be filed*" within a time certain—was subject to equitable tolling. *Id.* at 393-94 & n.10 (emphasis added). And in *Scarborough*, this Court ruled that a time limit providing that fee applications pursuant to the Equal Access to Justice Act "shall" be filed and "shall" contain certain allegations was subject to equitable exceptions. 541 U.S. at 407-08, 420-23. All of those time limits employed the word "'shall,'" which "normally creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (citing *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947)). Yet this Court never wavered from the rule that such absolute, facially exceptionless language does *not* foreclose equitable exceptions.

Similarly, in *Young v. United States*, 535 U.S. 43, 50 (2002), this Court—at the United States' urging—unanimously fashioned an equitable exception to the facially mandatory three-year "lookback period" for discharging a federal tax liability in bankruptcy. On its face, that statute excepted the discharge of *any* federal tax liability for which a return was due within three years of the filing of the bankruptcy petition. *See Young*, 535 U.S. at 46. Despite the mandatory, unqualified language of that exception, this Court held that the pendency of a prior bankruptcy petition equitably tolled that deadline. *Id.* at 47. To reach that result consistent with the Bankruptcy Code's absolute language, this Court relied on *Irwin*, noting the rule that Congress drafts such time peri-

ods in light of the presumption in favor of equitable tolling. *Id.* at 49-50.[3]

The mandatory language this Court repeatedly held to permit equitable tolling in those cases is indistinguishable from the language in the 15-day period in the VEOA. The VEOA provides that "in no event" may any VEOA claim be brought after a certain time. 5 U.S.C. § 3330a(d)(1). But language providing that certain claims "shall be barred"—which the government apparently concedes is not sufficiently emphatic to foreclose equitable tolling, Pet. 18—or providing that "no" claims may be filed after a date certain, on their face are as mandatory and unforgiving of exceptions as the words "in no event." That is no doubt why the government conceded below that the mandatory language in the 60-day time limit on filing a VEOA claim with the DOL—which provides that such claims "must be filed within 60 days," 5 U.S.C. § 3330a(a)(2)(A)—"on its face, could be interpreted as being susceptible to equitable tolling." Br. for Resp't Dep't of the Army at 25, *Kirkendall v. Dep't of the Army*, 479 F.3d 830 (Fed. Cir. 2007) (en banc).

That concession was correct, for "Congress must be presumed to draft limitations periods in light of" the presumption that mandatory language, by itself, is insufficient to foreclose equitable tolling. *Young*, 535 U.S. at 49-50. Congress enacted the VEOA just

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[3] This analysis is by no means a novelty introduced by *Irwin*; it has long been this Court's approach to supposedly "mandatory" deadlines. In, for example, *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959), this Court permitted equitable tolling of a statute that provided that "*[n]o* action shall be maintained . . . unless commenced within three years." *Id.* at 231 (emphasis added and internal quotation marks omitted).

eight years after *Irwin*, and therefore presumably followed the convention established in those cases: that facially absolute language alone does not foreclose equitable tolling. *See* Pet. App. 40a-41a (Gajarsa, J., concurring). As the Federal Circuit properly recognized, therefore, the "in no event" language "is little more than a neutral factor" in the analysis. *Id.* at 10a.

The government accuses the Federal Circuit of imposing "a 'magic words' requirement" that comes "perilously close" to requiring Congress "to state in the text of the statute 'equitable tolling shall not apply' in order to preclude tolling." Pet. 20. But that is not so. Congress easily may foreclose equitable tolling without resorting to incantations. For example, Congress could—as this Court has held it to have done several times—evince its intent to foreclose tolling by creating explicit exceptions—equitable or not—to the time limit, *see* Pet. App. 13a-14a, or by drafting a time limit in detailed, technical, or repeated terms, *see id.* at 16a-18a. In addition, Congress is well aware that the *Irwin* presumption only applies to suits against the government that contain an arguable private-suit analogue. *See id.* at 6a-8a. The Federal Circuit's reasoning is inapplicable to statutes that lack such an analogue. Indeed, it is the *government* that asks this Court to rule that the phrase "in no event" magically transmutes a time limit into an absolute bar, while equally absolute language such as "shall be barred" or "must be filed" does not.

The government also relies on *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), in which the Court declined to permit equitable tolling of a time requirement borrowed from three separate statutes of limitations in the securi-

ties laws, one of which used the words "in no event." *See* Pet. 18-19. But *Lampf* did *not* reach that holding via a "strict[] construc[tion]," *id.* at 18, (or, indeed, *any* "construction") of the words "in no event"; in fact, only one of the three time limits *Lampf* held to foreclose equitable tolling *even contained* that phrase. *See* 501 U.S. at 360 nn.6-7.

Instead, *Lampf*'s reasoning depended on the statutes' structure, which is nothing like the VEOA. The statutes in *Lampf* provided that a securities fraud action could either be brought within one year of the date the plaintiff discovered the violation, *or* within three years of the violation. *Id.* Those time periods were not subject to equitable tolling, the Court held, because the three-year period, in effect, served as an exception to the one-year limitations period; "the three-year period," the Court explained, therefore "can have no significance in this context other than to impose an outside limit." *Id.* at 363 (internal quotation marks and citation omitted). The VEOA, as the Federal Circuit recognized, contains no such exception or "outside limit." *See* Pet. App. 17a.

C. The VEOA's 15-day time limit is not an inflexible "appellate deadline"

Citing Judge Dyk's lone dissent below, the government in addition argues that the 15-day time period in the VEOA is not subject to equitable tolling because it is "a time limit for appellate review, rather than a time limit for the initiation of a claim." Pet. 21. This Court's precedents, however, create no *per se* rule that an "appellate" time deadline is *ipso facto* immune from equitable tolling. On the contrary, in *Bowen v. City of New York*, 476 U.S. 467, 478 (1986), this Court squarely held that the time period on appealing a decision by the Secretary of

Health and Human Services to deny Social Security benefits was subject to equitable tolling. And contrary to the government's suggestion, *id.* at 15 n.3, *Bowen* explicitly described that 60-day period as a time for "seek[ing] judicial review" of the Secretary's decision, and therefore recognized it was an appellate deadline. 476 U.S. at 473; *see also* Pet. App. 21a & n.9. The Federal Circuit relied on *Bowen* for this precise proposition. Pet. App. 21a-22a. Since the government cannot reasonably suggest that *Bowen* be reconsidered—and has made no such suggestion—*Bowen* forecloses the government's argument here.

In any event, the 15-day period on bringing a claim before the MSPB is not an inflexible "appellate" deadline under this Court's precedents. The VEOA provides that claimants must first file a claim with the DOL, and then, only after exhausting that remedy, may file a claim with the Board. But when it hears such a claim the Board is not "reviewing" the DOL's decision; what is being "appealed" is simply "the alleged violation," 5 U.S.C. § 3330a(d)(1)—in other words, the lawfulness of the employing agency's determination. In that respect, the 15-day period on filing such a claim with the Board is *precisely* parallel to the remedial scheme of Title VII, which provides that a claimant may file a claim in district court only after an unsuccessful attempt to obtain relief from the EEOC. *See also supra* pp. 8-9. Equitable tolling applies to Title VII's time limits. *See Irwin*, 498 U.S. at 95. It follows that tolling applies to the VEOA's time limits as well.

II. This Case Is Inappropriate For Plenary Review

The government argues, with almost palpable lack of enthusiasm, that this Court should grant ple-

nary review of the question of whether the 15-day time limit on filing a VEOA case in the MSPB should be equitably tolled. Pet. 22-23. But that question implicates no circuit split, or important question of federal law; and even if it did, this case would be an inappropriate vehicle to decide it.

A. This case presents no important question meriting plenary review

The government has abandoned its contention—advanced vigorously in its petition for rehearing en banc before the Federal Circuit and in its en banc merits brief—that the Federal Circuit's decision implicates any circuit split. *Id.* at 23. Instead, the government half-heartedly argues that the Federal Circuit's holding is "of threshold importance to the administration of the VEOA remedial scheme" with "nationwide effect," and will adversely impact other filing deadlines within the Federal Circuit's jurisdiction. *Id.* at 22-23. The government's petition, however, amounts to little more than a request for the correction of a supposed error that will have little impact outside, or even within, the unique statutory scheme of the VEOA.

The Federal Circuit's decision is unlikely to impact statutes other than the VEOA. The Federal Circuit employed a highly context-sensitive analysis to conclude that the time limits in the VEOA were subject to equitable tolling, and that analysis is not easily transferable to other statutes. *See supra* pp. 8-11. For example, the VEOA is a statute that protects veterans, and the Federal Circuit squarely rested its holding on this Court's "canon that veterans' benefits statutes should be construed in the veteran's favor." Pet. App. 22a (citing, among other cases, *King v. St. Vincent's Hospital*, 502 U.S. 215,

220 n.9 (1991)). Certainly the statutes the government cites as evidence of the supposedly significant effect of the Federal Circuit's holding, Pet. 23, are not comparable to the 15-day limit of the VEOA. Those provisions arise in different schemes and have entirely different language than the VEOA's 15-day appeal provision. Two of those time limits, for instance, have express exceptions, unlike the VEOA. *See* 5 U.S.C. § 1214(a)(3)(B); 29 U.S.C. § 255(a). Reviewing this case will therefore settle no significant question of federal law outside of the VEOA.

The government also vastly overstates the "nationwide" impact of the Federal Circuit's ruling on the administration of the VEOA itself. Pet. 23. While the Board does have eight regional offices throughout the United States, http://www.mspb.gov/sites/mspb/pages/Contact.aspx, its VEOA caseload is not substantial. To illustrate, DOL received 527 VEOA complaints in FY 2005, 21 of which were withdrawn. This number is skewed by the fact that one claimant filed 156 complaints in August 2005. *See* Office of the Assistant Secretary for Veterans' Employment & Training, U.S. Dep't of Labor, FY 2005 Annual Report to Congress 23 (2007), *available at* http://www.dol.gov/vets/media/FY2005_Annual_Report_To_Congress.pdf. In other words, DOL that year decided complaints brought by some 350 veterans, many of whom presumably did not seek review from the Board. By contrast, the Board decided 8,440 cases in FY 2005—6,847 decisions by administrative law judges at the regional offices, and 1,593 decisions by the full Board. U.S. Merit Systems Protection Board, Annual Report Fiscal Year 2005 (np), http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=278041&version=278351&application=ACROBAT. Therefore, even assuming all 350 veterans

sought review—though that number is undoubtedly much lower—VEOA claims constitute approximately four percent of the Board's docket.

The number of VEOA cases in which the question presented is even relevant is smaller still. Even of these VEOA claims before the Board, a large number are filed on time, so the Board need only evaluate whether equitable tolling applies in a much smaller subset of that small fraction of its docket. And even in untimely filed VEOA appeals, the question presented matters only if a litigant is actually entitled to equitable tolling—an infrequent occurrence. *See, e.g.*, *Irwin*, 498 U.S. at 96. This Court has better uses of its scarce resources than deciding an issue that will impact only a tiny fraction of cases filed in a single administrative court that is rarely relevant, let alone outcome determinative.

B. This case would not be a good vehicle to review the question presented even were that question certworthy

Even if the question presented merited this Court's attention in the abstract, this case would be an inappropriate vehicle in which to decide it.

First, the interlocutory posture of this case strongly counsels against immediate review. The Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari). This case flunks that requirement: the Federal Circuit remanded the case to the Board for further proceedings on Mr. Kirkendall's VEOA and USERRA claims. Should Mr. Kirkendall prevail on remand,

the United States may seek review of the Board's decision in the Federal Circuit, *see* 5 U.S.C. § 7703(d), and in this Court. Its request for review now is premature.

Second, the government has *not* asked this Court to review a closely related, threshold jurisdictional issue that could preclude this Court from ever reaching the question presented. Below, the United States contended that the Board lacked jurisdiction to hear Mr. Kirkendall's appeal because Mr. Kirkendall had not met the 60-day time limit on filing a VEOA claim with the DOL. Br. for Resp't Dep't of the Army at 30-37, *Kirkendall v. Dep't of the Army*, 479 F.3d 830 (Fed. Cir. 2007) (en banc). The Federal Circuit properly rejected that contention, Pet. App. 4a-6a, and the government's petition does not renew it—no doubt because the government recognizes that that question is insufficiently important to warrant review. If the government's position that the 60-day time limit is jurisdictional is taken seriously, this Court might well need to decide that question as a threshold matter in this case. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998). If it does, the Court may never reach the question the government's petition purports to present.

Regardless of whether the 60-day period on filing a VEOA claim with the DOL is jurisdictional, the government's failure to seek review of it in this case still makes this case a poor vehicle in which to decide whether the VEOA's 15-day time limit is subject to equitable tolling. The 60-day time limit for filing VEOA claims with the DOL, and the 15-day time limit on filing VEOA claims with the MSPB following a DOL decision are closely related, and the Federal Circuit's en banc decision reviewed those questions

together. Pet. App. 9a-10a, 16a. This Court should await a petition that presents both before reviewing either. This petition, however, presents only the latter question.

III. This Court Should Not Grant, Vacate, And Remand This Case In Light Of *Bowles*

The government argues that the Court should GVR this case in light of this Court's recent decision in *Bowles*. Pet. 11-16. But this case has nothing to do with *Bowles*.

Relying on this Court's "longstanding treatment" of time limits on appealing from Article III district courts as "mandatory and jurisdictional," *Bowles* held that a habeas petitioner's failure to file a notice of appeal within the 14-day reopening period deprived the court of appeals of jurisdiction. 127 S. Ct. at 2363-66. That holding is consistent with, and does not significantly affect, the Federal Circuit's analysis here. A GVR in light of *Bowles* is therefore unwarranted.

A GVR in light of an intervening decision of this Court is appropriate only if there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). Moreover, "if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate." *Id.* at 168. A GVR is clearly inappropriate under those criteria.

A. *Bowles* does not undermine the Federal Circuit's decision

As an initial matter, *Bowles* undermines no significant premise of the Federal Circuit's decision. The Federal Circuit did, of course, reject the government's contention that the 15-day time limit on filing an appeal with the MSPB is "mandatory and jurisdictional." Pet. App. 18a-22a. *Bowles* does not, however, cast doubt on the Federal Circuit's reasoning on that score. *Bowles* simply held, based on the specific structure of the statute before it and based on this Court's tradition of treating notices of appeal as jurisdictional, that the time for reopening an appeal from a district court's decision was mandatory and jurisdictional. 127 S. Ct. at 2366. The Federal Circuit went out of its way to reconcile its holding with that tradition.

The Federal Circuit conceded that "some provisions specifying the time for review are not subject to equitable tolling" because they are mandatory and jurisdictional Pet. App. 20a. Nonetheless, the Federal Circuit concluded that the structure of the VEOA did not support the conclusion that it was mandatory and jurisdictional like those statutes. *Id.* at 19a-20a. It distinguished its decision in *Oja v. Department of the Army*, 405 F.3d 1349 (Fed. Cir. 2005), *see id.* at 21a, which applied reasoning nearly identical to *Bowles*'. Relying on the rule that a notice of appeal from a United States District Court is "mandatory and jurisdictional," *Oja* held that the time limit on petitioning for judicial review from a decision of the MSPB to the Federal Circuit was not subject to equitable tolling. 405 F.3d at 1358-60. Judge Dyk's dissent, indeed, heavily relied upon the very court of appeals decision that *Bowles* affirmed. Pet. App. 82a. In other words, the Federal Circuit

has already considered, and rejected, the contention that the reasoning of *Bowles* changes the outcome of this case.

The government contends that the Article III appellate deadline *Bowles* held to be "mandatory and jurisdictional" shows that the VEOA's 15-day administrative deadline is as well. Pet. 13-16. As the government points out, both the VEOA's deadlines and the deadline in *Bowles* are "set out in a statute enacted by Congress, not simply in a rule adopted by a court or tribunal." *Id.* at 13. But this Court has repeatedly held that time limits set forth in statutes duly enacted by Congress are *not* "jurisdictional prerequisites" to suit, but instead are subject to "waiver, estoppel, and equitable tolling." *Zipes*, 455 U.S. at 393; *see Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989); *Honda v. Clark*, 386 U.S. 484, 501 (1967); cases cited *supra* pp. 11-13. The Federal Circuit correctly relied on that line of cases, Pet. App. 10a-18a, which *Bowles* did not mention, let alone overrule.

The government submits, however, that the 15-day time limit in the VEOA, like the one in *Bowles*, "governs the transfer of a case from one tribunal to another . . . and thus defines the class of cases that the appellate tribunal is competent to hear." Pet. 13-14. But *Bowles* cannot mean that *any* statute that "governs the transfer of a case from one tribunal to another" in *any* case is "mandatory and jurisdictional." On the contrary, where, as here, a claimant is seeking review after the decision of an *administrative adjudicator*, as opposed to the Article III district court at issue in *Bowles*, this Court has held that the time for seeking review is subject to equitable tolling.

In *Irwin*, for instance, this Court held that the statute governing the time for filing a Title VII ac-

tion in district court after a claimant's unsuccessful attempt to obtain relief from the EEOC is *not* "mandatory and jurisdictional." 498 U.S. at 95. Again, the VEOA's 15-day time limit governs the "transfer" of a case from the DOL to the MSPB in precisely the same sense that Title VII's time limit on filing a discrimination claim in federal court governs the transfer of a case from the EEOC to federal court. *See supra* pp. 8-9. And once again, in *Bowen*, this Court squarely held that a statute governing the transfer of a case from the Secretary of Health and Human Services to federal court "is not jurisdictional, but rather constitutes a period of limitations." 476 U.S. at 478. The Federal Circuit squarely relied on those cases to reach its judgment, Pet. App. 21a-22a, and *Bowles* leaves them untouched.

Finally, the government contends that the 15-day time limit is "mandatory and jurisdictional" within the meaning of *Bowles* because it "is contained in the same statutory section that contains the general grant of jurisdiction to the MSPB." Pet. 14. But that a time limit appears in a "grant of jurisdiction" does not make it immune from equitable tolling. For example, *Irwin*, *Scarborough*, and *Zipes* all allowed equitable tolling of time limits that appeared in statutory provisions waiving the sovereign immunity of the United States. "Sovereign immunity is jurisdictional in nature" and "the 'terms of the [United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). Yet those cases, and others, reject the government's notion that the presence of such a provision in a grant of jurisdiction, standing alone, makes it mandatory and jurisdictional. In *Henderson v. United*

States, 517 U.S. 654 (1996), to take another example, this Court squarely rejected the government's argument that a time period for serving the United States with process was "mandatory and jurisdictional" simply because it appeared in a statute waiving the sovereign immunity of the United States. *Id.* at 671-72. Indeed, the *Irwin* presumption *always* involves a "jurisdictional" statute, since it applies only to "suits against the Government." 498 U.S. at 95.

In any event, there is a world of difference between a grant of jurisdiction to the MSPB—an administrative adjudicator—and the notice of appeal provision at issue in *Bowles*, which governed the jurisdiction of an Article III appellate court. As *Bowles* noted, there is a long tradition of construing the deadline for appealing a case from one Article III court to another as "mandatory and jurisdictional." 127 S. Ct. at 2362. Not only is there no comparable tradition construing the deadline for filing a case in an administrative body that way, but there is also good reason not to begin one in this case.

Administrative deadlines are not the same as judicial ones. As Judge McConnell has explained, "the authority of a federal regulatory commission"—no less than any other administrative agency—"is not analogous to the subject-matter jurisdiction of a federal court." *Fuel Safe Wash. v. FERC*, 389 F.3d 1313, 1333 (10th Cir. 2004) (concurring opinion). The principle that "challenges to the subject matter jurisdiction of the federal courts . . . cannot be waived by the parties . . . is grounded in 'the nature and limits of the judicial power of the United States,' which is constitutional in nature, and 'inflexible and without exception.'" *Id.* (quoting *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884)). By contrast, "[t]he scope of regulatory jurisdiction . . . is

a matter of policy for Congress to decide." *Id.* In interpreting the boundaries of an Article III court's jurisdiction, therefore, courts must tread carefully. Those constitutional concerns are absent in this case, which involves the scope of the jurisdictional grant to an administrative adjudicator, the MSPB. Thus, the deadline for filing a discrimination charge with the EEOC, another administrative body, may be equitably tolled—even though that time period appears in the same section of the statute granting the EEOC jurisdiction over charges. *See Zipes*, 455 U.S. at 389 n.2, 393-94.

In the end, the government's arguments set up a diametric conflict between *Irwin* and *Bowles*, all but inviting this Court to overrule not only *Irwin*, but also its numerous predecessors and progeny that explicate and apply *Irwin*'s strong presumption in favor of equitable tolling. But those cases are perfectly consistent with *Bowles*. The *Irwin* presumption "govern[s] the applicability of equitable tolling in suits against the [federal] Government," 498 U.S. at 95, and only then when there is a sufficiently analogous private lawsuit to that federal-government suit, *Scarborough*, 541 U.S. at 422. *Bowles*, however, involved a federal habeas corpus petition by a state prisoner. The federal government was not the defendant in that case, and even had it been, there is no arguable private-suit analogue to a habeas corpus action. *Irwin* was beside the point in *Bowles*—which is why the Court in *Bowles* did not cite that decision. But *Irwin* squarely governs this case, and compels the conclusion that the time limits in the VEOA are subject to equitable tolling, as the Federal Circuit properly ruled. *See* Pet. 6a-18a, 28a-43a (Gajarsa, J., concurring).

B. Granting, vacating, and remanding this case in light of *Bowles* is not in the interest of judicial economy

A GVR in light of *Bowles* is also inappropriate in this case because "the delay and further cost entailed in a remand [is] not justified by the potential benefits of further consideration by the lower court." *Lawrence*, 516 U.S. at 168.

A GVR in light of *Bowles* would delay these proceedings with little corresponding benefit. Because this case has been remanded to the Board, the Federal Circuit will have an opportunity to reconsider its equitable-tolling holding in light of *Bowles* after Mr. Kirkendall prevails on his claims. *See supra* pp. 19-20. If the government is correct that *Bowles* is controlling here, the Federal Circuit would have ample opportunity to consider the effect of *Bowles* on its judgment, since the Federal Circuit adheres to the rule that otherwise-binding circuit precedent can be reconsidered if "undermined by intervening Supreme Court . . . authority." *Doe v. United States*, 372 F.3d 1347, 1354 (Fed. Cir. 2004); *see also Teva Pharms. USA, Inc. v. Novartis Pharms. Corp.*, 482 F.3d 1330, 1338 (Fed. Cir. 2007); *Atl. Thermoplastics Co. v. Faytex Corp.*, 970 F.2d 834, 838-39 n.2 (Fed. Cir. 1992).

The government thus stands to gain little from a GVR. It has *not* sought review of the Federal Circuit's ruling that Mr. Kirkendall was entitled to a hearing on his separate and distinct USERRA claim. That claim will therefore proceed regardless of what happens on remand after any GVR. Since there will be further remand proceedings in the Board regardless of whether this Court GVRs the Federal Circuit's equitable-tolling ruling, doing so would do little to preserve the government's resources even were it

somehow to persuade the Federal Circuit that *Bowles* has decisive relevance to its decision.

The cost to Mr. Kirkendall of a GVR, on the other hand, is great. Mr. Kirkendall has been unlawfully denied a hearing on his USERRA claim for years. This Court should not compound that delay so that the Federal Circuit may consider the effect of a decision the relevance of which it has already essentially rejected, and that it will have a chance to consider in any event even were it relevant.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 07-19

In the Supreme Court of the United States

DEPARTMENT OF THE ARMY, PETITIONER

v.

JOHN E. KIRKENDALL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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JOHN E. KIRKENDALL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The 7-6 en banc majority of the Federal Circuit erred in this case both by concluding that the 15-day statutory time limit for filing an appeal with the Merit Systems Protection Board under the Veterans Employment Opportunities Act of 1998 (VEOA), 5 U.S.C. 3300a(d), is not jurisdictional (and therefore not mandatory) and by concluding that the time limit is subject to equitable tolling. With regard to the former conclusion, respondent suggests (Br. in Opp. 21-28) that it is unnecessary for this Court to vacate the court of appeals' judgment and remand in light of the Court's intervening decision in *Bowles* v. *Russell*, 127 S. Ct. 2360 (2007), on the theory that *Bowles*, which held that a similar appellate time limit was mandatory, does not call into question the court of appeals' analysis. With regard to the latter conclusion, respondent contends (Br. in Opp. 7-21) that, assuming that the time limit is non-jurisdictional, further review is not warranted, because the court of appeals correctly followed decisions from this Court holding that equitable tolling was available under differently

(and less emphatically) worded statutes. Respondent's reasoning is flawed on both counts.

A. The Court of Appeals' Jurisdictional Ruling Cannot Be Squared With *Bowles* v. *Russell*

1. In rejecting the government's argument that the appellate time limit in Section 3330a(d)(1) is jurisdictional (and therefore mandatory), the court of appeals held that statutes specifying periods for review, no less than statutes of limitations, were subject to a presumption in favor of equitable tolling. Pet. App. 19a. The court of appeals asserted that this Court had "clarified that time prescriptions, however emphatic, are not properly typed 'jurisdictional.'" *Id.* at 19a-20a (internal quotation marks omitted) (citing *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500 (2006); *Eberhart* v. *United States*, 546 U.S. 12 (2005) (per curiam); *Scarborough* v. *Principi*, 541 U.S. 401 (2004); and *Kontrick* v. *Ryan*, 540 U.S. 443 (2004)). In *Bowles*, however, this Court held that the failure to file a notice of appeal within the statutory period deprived a court of appeals of jurisdiction. 127 S. Ct. at 2363-2366. Critically, the Court distinguished all four of the prior decisions on which the court of appeals had relied, explaining that "none of them calls into question our longstanding treatment of statutory time limits for taking an *appeal* as jurisdictional" and that "those decisions have also recognized the jurisdictional significance of the fact that a time limitation is set forth in a *statute*." *Id.* at 2364 (emphases added). *Bowles* thus knocks out the underpinnings of the court of appeals' reasoning in holding that the time limit in Section 3330a(d)(1) is not jurisdictional.

Respondent makes no effort to contend otherwise; indeed, he scarcely acknowledges the prior decisions of

this Court on which the court of appeals primarily relied. Instead, he contends that "this case has nothing to do with *Bowles*," Br. in Opp. 21, on the theory that a different rule should apply to time limits for appeals to administrative agencies from that for appeals to Article III courts, *id.* at 1-2, 23-24, 25-26. As a preliminary matter, that contention is best addressed in the first instance by the court of appeals on remand, because that court did not have the benefit of *Bowles* when it issued its decision. Cf. *Lawrence ex rel. Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam) (providing that a remand is appropriate where there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration").

In any event, respondent's contention lacks merit. Congress can constrain administrative agencies, no less than Article III courts, by specifying the circumstances under which they have jurisdiction to hear cases, including when they act in the capacity of appellate tribunals—and, when Congress does so, agencies have no greater authority than courts to deviate from those constraints. Notably, respondent fails to cite a single decision, from this Court or any other court, that stands for the proposition that appellate time limits for administrative agencies are not "jurisdictional," in the sense of being mandatory. The sole authority respondent cites (Br. in Opp. 25) is a concurring opinion by Judge McConnell, which, far from supporting respondent's position, simply reaffirms the principle that "[t]he scope of regulatory jurisdiction * * * is a matter of policy for Congress to decide," *Fuel Safe Washington* v. *FERC*, 389 F.3d 1313, 1333 (10th Cir. 2004), and concludes that, in the statute at issue, Congress did not permit a party to challenge

the agency's jurisdiction for the first time in a petition for review to an Article III court, see *id.* at 1333-1334.[1]

Respondent more generally relies (Br. in Opp. 15-16, 23-24) on this Court's decisions in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), and *Bowen* v. *City of New York*, 476 U.S. 467 (1986). Both of those cases, however, are distinguishable on the ground that they did not involve deadlines for filing "appeals," but rather deadlines for initiating litigation in Article III courts. See *Irwin*, 498 U.S. at 91 (30-day limit for filing civil action under Title VII after receiving notice of final action by EEOC); *Bowen*, 476 U.S. at 478 (60-day limit for filing civil action under Social Security Act after receiving notice of final decision by Commissioner). Although respondent notes (Br. in Opp. 16) that, at one point in its opinion in *Bowen*, the Court described the statute at issue as providing a mechanism for "seek[ing] judicial review," 476 U.S. at 472, the Court, in rejecting the argument that the 60-day limit was jurisdictional, repeatedly characterized the statute as a statute of "limitations," *id.* at 478-479. Accordingly, neither *Bowen* nor *Irwin* supports respondents' argument that the time limit on appeals at issue here is not jurisdictional. And of course, neither of those cases undermines the rationale of *Bowles*, which compels the contrary conclusion.

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[1] Respondent contends (Br. in Opp. 16) that the time limit at issue in this case is not an "appellate" time limit, because the MSPB does not directly review the underlying decision of the Secretary of Labor. That time limit, however, is "appellate" in the relevant sense, because it governs the transfer of a case from one tribunal to another—*i.e.*, from the Secretary to the MSPB. Notably, the statute establishing the time limit repeatedly characterizes the action before the MSPB as an "appeal." See, *e.g.*, 5 U.S.C. 3330a(d)(1) and (d)(2).

2. Respondent suggests (Br. in Opp. 27) that it would be inappropriate to vacate and remand this case in light of *Bowles* because doing so would delay the hearing that the court of appeals awarded him under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301 *et seq.* As a preliminary matter, to the extent that such a remand would result in delay, it is because *respondent* agreed to stay proceedings on his USERRA claim before the MSPB, pending this Court's disposition of the government's petition for a writ of certiorari on his VEOA claim. See 7/27/07 Initial Decision 2. It is therefore unsurprising that, in entering the stay, the administrative judge concluded that respondent would suffer no prejudice from the delay. See *ibid.* More broadly, however, if the Court were to decide not to vacate and remand solely on the ground that it would delay respondent's USERRA hearing, it would effectively penalize the government for failing to seek further review of the court of appeals' holding on whether respondent was entitled to that hearing in the first place. See Pet. 10 n.1.[2]

To the extent that respondent suggests (Br. in Opp. 27) that it would also be inappropriate to vacate and remand because the government could obtain further review of the court of appeals' holding after the underlying VEOA claim is adjudicated, that suggestion also lacks merit. Notwithstanding respondent's contention (Br. in

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[2] While a majority of the en banc court of appeals held that a USERRA complainant is entitled to a hearing as a matter of right, a different majority held that the source of that right was an MSPB regulation (which the MSPB could presumably decide to amend). See Pet. App. 23a-28a (plurality opinion); *id.* at 58a-62a (Moore, J., concurring in the result in relevant part); *id.* at 63a-80a (Bryson, J., dissenting).

Opp. 17-19) that the question presented is neither important nor recurring, the court of appeals' holding is already having deleterious effects in other VEOA cases, and its reasoning calls into question the firmness of other statutory time limits as well. See Pet. 23. Those effects will undoubtedly continue as long as the court of appeals' holding remains in place. This Court should therefore vacate the decision below and afford the court of appeals the opportunity to reconsider, in light of *Bowles*, whether the time limit in Section 3330a(d)(1) is jurisdictional.

B. The Court Of Appeals Further Erred By Allowing Equitable Tolling

1. Having held that the time limit in Section 3330a(d)(1) is not jurisdictional, the court of appeals further erred by concluding that the time limit is subject to equitable tolling. In so doing, the court rejected the government's argument that Section 3330a(d)(1), which provides that a VEOA appeal "in no event may * * * be brought * * * later than 15 days" after the claimant receives written notice from the Secretary of Labor, contains unusually emphatic language that overcomes the ordinarily applicable presumption in favor of equitable tolling. Pet. App. 10a. Further, the court dismissed "the statute's technical language" as "little more than a neutral factor in our analysis." *Ibid.*

In defense of that extraordinary reasoning, respondent contends (Br. in Opp. 11-13) that Section 3330a(d)(1) is no more emphatic than other statutes providing that a claim "must be filed" within a certain period (or that a claim "shall be barred" *unless* it is filed within a certain period), some of which have been held to be subject to equitable tolling. That contention, how-

ever, is mistaken, for the straightforward reason that Congress could have written Section 3330a(d)(1) in those terms. It did not, and instead provided that the deadline in Section 3330a(d)(1) was "in no event" subject to exception. Tellingly, respondent offers no response to the point that a reading of Section 3330a(d)(1) that permitted equitable tolling would render the phrase "in no event" superfluous. See, *e.g.*, *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 36 (1992). Nor does respondent cite a single case in which a court has construed a statute that uses the phrase "in no event" to permit equitable tolling; to the contrary, in other statutes, that phrase has consistently been construed strictly. See Pet. 18-19.

For the same reason, respondent's reliance (Br. in Opp. 9-10) on *United States* v. *Brockamp*, 519 U.S. 347 (1997), is unavailing. The statute in *Brockamp* provided that a "[c]laim for * * * refund * * * of any tax * * * shall be filed by the taxpayer" within a specified time period (and repeated that time limit on several occasions). 26 U.S.C. 6511(a). Notwithstanding that less emphatic statutory language, the Court held that other features of the statute provided a sufficient basis to overcome the presumption in favor of equitable tolling. See *Brockamp*, 519 U.S. at 350-354. Those additional features, however, are not necessary where, as here, the "in no event" language of the statute is itself sufficiently emphatic to overcome the presumption.

Respondent effectively takes the position (Br. in Opp. 14) that, in order to foreclose equitable tolling, Congress must either use "magic words" in the statute (*i.e.*, by expressly providing that "equitable tolling shall not apply"), or include the additional features that the Court cited in *Brockamp*. There is no reason, however, to impose those drafting conditions on Congress. With

regard to Section 3330a(d)(1), respondent notes (Br. in Opp. 10) that the statute is "relatively short"; sets out its time limit in "straight-forward, simple terms"; and states that time limit only once. Respondent does not explain, however, why Congress should be required to repeat a time limit, or to use particularly complex or prolix language, in order to avoid equitable tolling, especially when a simple, emphatic "in no event" would seem to have the same effect. Nor is there any reason to adopt a rule of construction that would encourage Congress to repeat itself (or to speak obscurely and at length).

Respondent further notes (Br. in Opp. 10) that Section 3330a "contains no explicit exceptions that might suggest that Congress deliberately considered, yet rejected, equitable tolling." The obvious inference to be drawn from the fact that Congress specified that a VEOA appeal "in no event may * * * be brought" outside the 15-day limit, however, is that Congress intended that there be *no* exceptions to that limit. Congress need not include *explicit* exceptions simply in order to foreclose the possibility that a broader *implicit* exception would subsequently be read into the statute. Instead, this Court presumes that Congress means what it says in a statute, and here that rule of construction compels the conclusion that Congress meant that the deadline in Section 3330a(d)(1) was "in no event" subject to exception. The court of appeals' contrary conclusion was erroneous, and, in the event that this Court does not vacate and remand for *Bowles*, it should grant plenary review to correct that conclusion.

2. Respondent seemingly acknowledges that, because the Federal Circuit has exclusive jurisdiction over appeals from MSPB decisions in VEOA cases, see

28 U.S.C. 1295(a)(9), no circuit conflict will arise on the availability of equitable tolling under Section 3330a(d)(1). Respondent nevertheless contends (Br. in Opp. 17-19) that further review is unwarranted because the Federal Circuit's decision will have only limited effects on the interpretation of *other* statutes. That contention, however, is belied by the Federal Circuit's extensive reliance in this case on its earlier decision in *Bailey* v. *West*, 160 F.3d 1360 (1998), in which a divided en banc court, using similar methodology, held that the time limit for filing appeals from the Board of Veterans' Appeals to the Court of Veterans Appeals is subject to equitable tolling. *Id.* at 1368. This Court's intervention is warranted not only to correct the Federal Circuit's erroneous decision in this case, but to ensure that the Federal Circuit will not continue to employ that unduly broad methodology in future cases concerning the availability of equitable tolling.

Finally, respondent contends (Br. in Opp. 20) that this case would constitute a poor vehicle for resolving the question presented because the government did not seek review on the "closely related" question whether the 60-day time limit for filing a VEOA *complaint* (with the Secretary of Labor) is also subject to equitable tolling. The time limit for filing a VEOA complaint, however, is worded in less emphatic terms than the time limit for filing a VEOA appeal. See 5 U.S.C. 3330a(a)(2)(A) (providing that a VEOA complaint "must be filed within 60 days after the date of the alleged violation"). Respondent hints, but stops short of affirmatively arguing (Br. in Opp. 20), that the VEOA time limits are "jurisdictional" for purposes of the rule that an Article III court must consider questions of *its own* jurisdiction at the threshold. See *Steel Co.* v. *Citizens for*

a Better Env't, 523 U.S. 83, 95 (1998). Even if that were true, however, there is no reason that this Court would have to consider the question whether equitable tolling is available for the filing of a VEOA complaint *before* the question whether it is available for the filing of a VEOA appeal. See *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (explaining that, "[w]hile * * * subject-matter jurisdiction necessarily precedes a ruling on the merits, the same principle does not dictate a sequencing of jurisdictional issues"). It is thus unnecessary for this Court to consider both questions in one case. And no such issue would arise if the Court were simply to vacate and remand in light of its intervening decision in *Bowles*.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration in light of *Bowles* v. *Russell*, 127 S. Ct. 2360 (2007). In the alternative, the petition should be granted and the case set for briefing and oral argument.

Respectfully submitted.

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Solicitor General

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